TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. ~~1548.~~ 1134

H. Z. BURKHART, SPEAKER OF THE HOUSE OF REPRESENTATIVES OF THE FIFTEENTH SESSION OF THE LEGISLATURE OF IDAHO TERRITORY, APPELLANT,

vs.

C. H. REED, CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES, AND E. J. CURTIS, SECRETARY OF THE TERRITORY OF IDAHO.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

FILED APRIL 12, 1889.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, MAY 7, 1889.

1 In the Supreme Court of the Territory of Idaho.

H. Z. BURKHART, Speaker of the House of Representatives of Idaho Territory, Plaintiff,

vs.

CHARLES H. REED, Chief Clerk of the House of Representatives of Idaho Territory, Defendant.

The above-named plaintiff, H. Z. Burkhart, as speaker of the house of representatives of Idaho, complains of the above-named defendant, Charles H. Reed, as chief clerk of the house of representatives of Idaho, and for cause of action alleges—

1. That the plaintiff is the duly elected and qualified speaker of the house of representatives of the Territory of Idaho for the fifteenth session.

2. That the defendant is the chief clerk of said house of representatives for said session.

3. That said defendant has in his possession as such chief clerk the minutes of the proceedings of said house of representatives for the last day of said fifteenth session; that the same have not yet been signed by the plaintiff as such speaker, and the defendant refuses to present the same to the plaintiff for his signature and to file the same with the secretary of the Territory or to permit the plaintiff as such speaker to inspect and sign the same; that said minutes were read and approved by said house of representatives, and the defendant unlawfully and wrongfully withholds the same from the plaintiff and unlawfully and wrongfully refuses to file the same with the secretary of the Territory of Idaho.

2 That the plaintiff did, on the 8th day of February, A. D. 1889, demand of the defendant that he present said minutes of proceedings to the plaintiff for signature, and that he failed and refused and still fails and refuses to so present the same.

That the rules and practice of said house of representatives require that said defendant present all the minutes of the proceedings thereof to the plaintiff as such speaker upon the approval thereof for his signature.

Wherefore the plaintiff prays that a writ of mandate issue against said defendant commanding him immediately after the receipt of the writ to submit the minutes of the proceedings of the said last day of the fifteenth session of the house of representatives for his inspection and signature, and that immediately thereafter he file the same with the secretary of the Territory of Idaho, or to show cause forthwith before this court, at the court-room thereof, why he has not done so.

LYTTLETON PRICE,
Attorney for Plaintiff.

TERRITORY OF IDAHO, *County of Ada:*

H. Z. Burkhart, being duly sworn, says that he is the plaintiff named in the foregoing complaint; that he has read said complaint and knows the contents thereof, and that the same is true of his own knowledge. H. Z. BURKHART.

Subscribed and sworn to before me this 8th day of February, A. D. 1889.

[SEAL.]

S. H. HAYS,
Clerk Supreme Court.

3 Endorsed as follows: In the supreme court, Idaho Territory. H. Z. Burkhart, speaker, etc., *vs.* C. H. Reed, chief clerk, etc. Complaint. Filed Feb. 8th, 1889. S. H. Hays, clerk. Lyttleton Price, att'y for pl'ff.

4 In the Supreme Court of the Territory of Idaho.

H. Z. BURKHART, Speaker of the House of Representatives of Idaho Territory, Plaintiff,

vs.

CHAS. H. REED, Chief Clerk of the House of Representatives of Idaho Territory, Defendant.

The Territory of Idaho to Chas. H. Reed, defendant:

It appearing to the court that the plaintiff, H. Z. Burkhart, is the duly elected and qualified speaker of the house of representatives of the Territory of Idaho for its fifteenth session, and that the defendant, Charles H. Reed, is the chief clerk of said house of representatives for said session, and that said defendant as such chief clerk has in his possession the minutes of the proceedings of the last day of said session of the house of representatives, and that the said minutes have been read and approved by said house of representatives, and that said defendant as such chief clerk fails and refuses to submit to the plaintiff as such speaker the said minutes of said proceedings for his inspection and signature, as required by the rules and practice of said house of representatives, after demand upon him by the plaintiff therefor:

Therefore you, the said Charles H. Reed, are hereby commanded that, laying aside all excuses, you forthwith, after the service upon you of this writ, submit the minutes of the proceedings of the last day of the fifteenth session of the house of repre-
5 sentatives of Idaho Territory to the plaintiff for his inspection and signature, as the speaker of said house of representatives, and that immediately thereafter you do file the same with the secretary of Idaho; or that, failing to do so, you show cause before the supreme court of Idaho, at the court-room of said court, at Boise City, Idaho, at 2 o'clock p. m. on the 12th day of February, A. D. 1889, why you have not done so.

Witness the honorable supreme court of Idaho Terri-
[SEAL.] tory this 8th day of February, A. D. 1889, and the seal of said court.

H. W. WEIR,
C. J. of said Court.

Attest:

S. H. HAYS, *Clerk.*

6 Endorsed as follows: Office of the U. S. marshal for the district of Idaho Ter. I certify that I received the within-writ, on the 8th day of February, 1889, and personally served the same on the 8th day of February, 1889, on Chas. H. Reed, the within-named defendant, by delivering to said Reed a true copy of said writ, together with a certified copy of the complaint in the action named in said writ, at Boise City, Idaho Territory. Dated this 9th day of February, A. D. 1889. Ezra Baird, U. S. marshal, dist. of Idaho Territory. In the supreme court, Idaho Territory. H. Z. Burkhart, speaker, &c., *v.* Chas. H. Reed, chief clerk, &c. Writ of mandate. Filed Feb. 9th, 1889. S. H. Hays, clerk.

7 In the Supreme Court of Idaho Territory. January Term, 1889.

In Re H. Z. BURKHART *ag'st* CHARLES H. REED, Defendant. } Application for Writ of Mandate.

Now comes said Charles H. Reed and, in answer to the alternative writ of mandate heretofore issued and served in this proceeding, respectfully shows this honorable court—

First. For a first defence, he denies that he has or had, at the time of the service upon him of the alternative — of mandate in this proceeding, in his possession the minutes of the proceedings of the last day of the fifteenth session of the house of representatives of the Territory of Idaho or any part or portion of said minutes.

And, further answering, he avers that prior to service upon him or notice to him of said alternative writ of mandate and prior to any notice or knowledge by him of said or any application to this honorable court therefor, and on the eighth day of February, 1889, he delivered said minutes to the secretary of the Territory, as required by law to do, and from thence hitherto has had and now has neither possession or control or the right to the possession or control of the same.

Wherefore defendant prays that he be dismissed hence without day with his costs and disbursements herein.

CHAS. H. REED.

8 TERRITORY OF IDAHO, } ss:
County of Ada, }

Charles H. Reed, being first duly sworn, says that he is the defendant in the above-entitled proceeding named; that he has heard the foregoing return read and knows the contents thereof, and that the same is true of his own knowledge.

CHAS. H. REED.

Subscribed and sworn to before me this 12th day of February, A. D. 1889.

S. H. HAYS, *Clerk.*

Subscribed and sworn to before me this 8th day of February, A. D. 1889.

[SEAL.]

S. H. HAYS,
Clerk Supreme Court.

3 Endorsed as follows: In the supreme court, Idaho Territory. H. Z. Burkhart, speaker, etc., *vs.* C. H. Reed, chief clerk, etc. Complaint. Filed Feb. 8th, 1889. S. H. Hays, clerk. Lyttleton Price, att'y for pl'ff.

4 In the Supreme Court of the Territory of Idaho.

H. Z. BURKHART, Speaker of the House of Representatives of Idaho Territory, Plaintiff,

vs.

CHAS. H. REED, Chief Clerk of the House of Representatives of Idaho Territory, Defendant.

The Territory of Idaho to Chas. H. Reed, defendant:

It appearing to the court that the plaintiff, H. Z. Burkhart, is the duly elected and qualified speaker of the house of representatives of the Territory of Idaho for its fifteenth session, and that the defendant, Charles H. Reed, is the chief clerk of said house of representatives for said session, and that said defendant as such chief clerk has in his possession the minutes of the proceedings of the last day of said session of the house of representatives, and that the said minutes have been read and approved by said house of representatives, and that said defendant as such chief clerk fails and refuses to submit to the plaintiff as such speaker the said minutes of said proceedings for his inspection and signature, as required by the rules and practice of said house of representatives, after demand upon him by the plaintiff therefor:

Therefore you, the said Charles H. Reed, are hereby commanded that, laying aside all excuses, you forthwith, after the service upon you of this writ, submit the minutes of the proceedings of the last day of the fifteenth session of the house of repre-
5 sentatives of Idaho Territory to the plaintiff for his inspection and signature, as the speaker of said house of representatives, and that immediately thereafter you do file the same with the secretary of Idaho; or that, failing to do so, you show cause before the supreme court of Idaho, at the court-room of said court, at Boise City, Idaho, at 2 o'clock p. m. on the 12th day of February, A. D. 1889, why you have not done so.

Witness the honorable supreme court of Idaho Terri-
[SEAL.] tory this 8th day of February, A. D. 1889, and the seal of said court.

H. W. WEIR,
C. J. of said Court.

Attest:
S. H. HAYS, *Clerk.*

6 Endorsed as follows: Office of the U. S. marshal for the district of Idaho Ter. I certify that I received the within-writ, on the 8th day of February, 1889, and personally served the same on the 8th day of February, 1889, on Chas. H. Reed, the within-named defendant, by delivering to said Reed a true copy of said writ, together with a certified copy of the complaint in the action named in said writ, at Boise City, Idaho Territory. Dated this 9th day of February, A. D. 1889. Ezra Baird, U. S. marshal, dist. of Idaho Territory. In the supreme court, Idaho Territory. H. Z. Burkhart, speaker, &c., *v.* Chas. H. Reed, chief clerk, &c. Writ of mandate. Filed Feb. 9th, 1889. S. H. Hays, clerk.

7 In the Supreme Court of Idaho Territory. January Term, 1889.

In Re H. Z. BURKHART *ag'st* CHARLES H. REED, Defendant. } Application for Writ of Mandate.

Now comes said Charles H. Reed and, in answer to the alternative writ of mandate heretofore issued and served in this proceeding, respectfully shows this honorable court—

First. For a first defence, he denies that he has or had, at the time of the service upon him of the alternative — of mandate in this proceeding, in his possession the minutes of the proceedings of the last day of the fifteenth session of the house of representatives of the Territory of Idaho or any part or portion of said minutes.

And, further answering, he avers that prior to service upon him or notice to him of said alternative writ of mandate and prior to any notice or knowledge by him of said or any application to this honorable court therefor, and on the eighth day of February, 1889, he delivered said minutes to the secretary of the Territory, as required by law to do, and from thence hitherto has had and now has neither possession or control or the right to the possession or control of the same.

Wherefore defendant prays that he be dismissed hence without day with his costs and disbursements herein.

CHAS. H. REED.

8 TERRITORY OF IDAHO, *County of Ada,* } *ss:*

Charles H. Reed, being first duly sworn, says that he is the defendant in the above-entitled proceeding named; that he has heard the foregoing return read and knows the contents thereof, and that the same is true of his own knowledge.

CHAS. H. REED.

Subscribed and sworn to before me this 12th day of February, A. D. 1889.

S. H. HAYS, *Clerk.*

Endorsed as follows: In supreme court, Idaho Territory. H. Z. Burkhart *v.* Charles H. Reed. Return to alternative writ of mandate. Filed Feb. 12th, 1889. S. H. Hays, clerk.

9 In the Supreme Court of the Territory of Idaho.

H. Z. BURKHART, Speaker, &c., Pl'ff,
vs.
C. H. REED, Chief Clerk, &c., Def't.

TERRITORY OF IDAHO, } *ss:*
County of Ada, }

Lyttleton Price, being duly sworn, on his oath says that he is the attorney for the plaintiff in the above-entitled action; that, in order to determine all matters in controversy therein and that justice may be done, it is necessary and indispensable that Edward J. Curtis, secretary of the Territory of Idaho, be made a party defendant herein, as will more fully and particularly appear by the answer of C. H. Reed, the defendant herein, it appearing by said answer that the said Edward J. Curtis, as such secretary, is the custodian of the minutes of the proceedings of the last day of the fifteenth session of the Legislative Assembly of the Territory of Idaho, and that the same have not been signed by the plaintiff as speaker of the said house of representatives nor submitted to him for his signature.

LYTTLETON PRICE.

Subscribed & sworn to before me this 12th day of Feb., 1889.
S. H. HAYS, *Clerk.*

10 Endorsed as follows: I hereby acknowledge that the clerk of the supreme court served me with a copy of within affidavit at 7 o'clock p. m., February 12, 1889. Richard Z. Johnson. In supreme court Idaho Territory. H. Z. Burkhart, speaker, &c., pl'ff, *vs.* C. H. Reed, chief clerk, &c., def't. Affidavit of Lyttleton Price. Filed Feb. 12th, 1889. S. H. Hays, clerk. Lyttleton Price, att'y for pl'ff.

11 In the Supreme Court of the Territory of Idaho.

H. Z. BURKHART, Speaker, &c., Pl'ff,
vs.
C. H. REED, Chief Clerk, &c., Def't.

Please take notice that on the affidavit of Lyttleton Price & upon the answer of the defendant, C. H. Reed, herein, and upon the papers, pleadings, and proceedings on file in this action, the plaintiff will move the court, at the court-room thereof, at the capitol building, in Boise City, on the 13th day of February, 1889, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, that the plaintiff may have leave to amend the affidavit — writ of mandate herein by adding the name of Edward J. Curtis, secretary of the

Territory of Idaho, as a defendant herein, with proper words to charge him, and for such other and further relief as may be just.

Dated February 12th, 1889.

Yours, &c., LYTTLETON PRICE,
Att'y for Pl'ff.

To the Hon. R. Z. Johnson, att'y gen'l of the Territory of Idaho, att'y for def't.

Let the time for hearing the motion mentioned in the foregoing notice be shortened, so that the same may be heard on the 13th day of February, 1889, at 10 o'clock a. m.

Dated Feb'y 12, 1889.

By the court:

H. W. WEIR, *C. J.*

12 Endorsed as follows: I hereby acknowledge that the clerk of the supreme court served me with a copy of within notice & order at 7 o'clock p. m., February 12, 1889. Richard Z. Johnson. In supreme court, Idaho territory. H. Z. Burkhart, speaker, &c., pl'ff, *vs.* Chas. H. Reed, chief clerk, &c., def't. Notice of motion. Filed Feb. 12th, 1889. S. H. Hays, clerk. Lyttleton Price, att'y for pl'ff.

13 In the Supreme Court of the Territory of Idaho.

H. Z. BURKHART, Speaker of the House of Representatives of Idaho Territory, Plaintiff,

vs.

CHARLES H. REED, Chief Clerk of the House of Representatives of Idaho Territory, and Edward J. Curtis, Secretary Idaho Territory Defendants.

It appearing to the court that the plaintiff, H. Z. Burkhart, is the duly elected, qualified, and acting speaker of the house of representatives of the Territory of Idaho for its fifteenth session, and that the defendant, Chas. H. Reed, is the chief clerk of said house of representatives for said session, and that said defendant, as such chief clerk, has in his possession the minutes of the proceedings of the last day of said session of said house of representatives, and that said minutes have been read and approved by said house of representatives and so declared to said house by said speaker on said last day of said session, then and there; and that thereafter the said speaker asked the clerk of said house of representatives if there was any further business before the house, and said clerk then and there replied that there was none; and that thereupon, and after the hour of 12 o'clock midnight of the 7th day of February, 1889, being the sixtieth and last day of said session, the plaintiff, as said speaker acting as such, announced that the time has now arrived when by the law of Congress of the United States this session must close by limitation of time, and declared the house adjourned *sine die;* and that to said

announcement of the arrival of the time of adjournment there
14 was no dissent by said house of representatives or any member thereof, and that said speaker of the house of representatives did then and there, so acting as such speaker, actually adjourn such house of representatives on the sixtieth day of said session, after the end of said day and after the hour of 12 o'clock at night of said day; that after said speaker had so adjourned said house of representatives on said day and hour the said speaker and a portion of the members of said house of representatives left the assembly room, and thereafter several members of said Legislature elected a pretended speaker thereof and pretended to pass acts and perform the duties of the house of representatives; that all their acts and doings in such pretended Legislature were had and taken and held after the hour for final adjournment had arrived and after the actual final adjournment of said house of representatives; that when said speaker, Burkhart, did so adjourn said body no member thereof objected to the same, and that all acquiesced in the same; that it was and is the duty of defendant, Chas. H. Reed, as such chief clerk, to make and keep correct and true minutes of the doings and proceedings of said house of representatives, and that when they are approved by the speaker of the house of representatives it is his custom and his duty to sign the same as such speaker; that said Chas. H. Reed has wrongly and fraudulently falsified said record as the minutes of said house of said last day's session; that he has taken from and kept out of said minutes the fact that said speaker had said minutes read and approved, and that he declared the same duly approved, and that he, said speaker, asked the clerk of the house if
there was any further business, and that said clerk replied
15 there was none, and that the said speaker adjourned the said house of representatives without day and declared the same adjourned according to the laws of the United States, as the time fixing the limit of the session had expired; that said clerk wrongly and falsely put into the pretended minutes of said last day's session of said house the statement that, pending the reading — the journal, said speaker left the chair and went out of said house, when, in truth and in fact, said speaker did not leave the house till after its final adjournment. The said Chas. H. Reed neglected and refused to allow said speaker to inspect or to revise or to approve or to sign said minutes, and did obtain the signature of one George P. Wheeler to the said minutes, a member of said Legislature, but neither the speaker or an actual speaker *pro tem.* of said house; that said defendant, Chas. H. Reed, has filed with Ed. J. Curtis, secretary of Idaho, said pretended, changed, and falsified minutes as the true minutes of said last day's session; that said minutes are not signed by the said speaker of said house, as the law and custom require, and that this fact is known to said Curtis; that said Edward J. Curtis is the secretary and acting secretary of Idaho Territory; that on the 7th day of February, 1889, demand was made by Lyttleton Price, in behalf of said speaker, H. Z. Burkhart, that said Curtis do not record said proceedings and enactments after said adjournment as the proceedings of said house of representatives, and that the

same be not treated and held out as the minutes of said house of representatives; that the said Edward J. Curtis is, as such secretary, wrongfully treating, claiming, and pretending that said false and incorrect pretended minutes are the real, true, and correct journals and minutes of said house of representatives, and is threat-
16 ening to continue so to do and to record and preserve the said pretended minutes as a record of the proceedings of said house of representatives had on said last day of its fifteenth session.

Therefore you, the said Chas. H. Reed, and you, the said Edward J. Curtis, are hereby commanded to bring such minutes and pretended minutes and journal of the said house of representatives into court, so that the same may be corrected so as to state the facts, and that said Chas. H. Reed correct the same in accordance with the facts, so that it may appear in the proper place in said minutes; that said speaker asked the clerk if there was any further business before the house, and that the clerk said there was not; and that thereupon the minutes were read and approved, and that thereupon, it then being 12 o'clock midnight, the said speaker announced to the house that, the time having arrived when the session must close according to law of Congress, he therefore now declared the house adjourned *sine die*, and that to the said announcement of the expiration of the time of the session there was no dissent, and that to the said order of final adjournment there was no objection, and that in every way, manner, and particular said clerk, Chas. H. Reed, make said minutes correspond with the facts and be a true, full, and complete record of said last day's session of said house of representatives and be nothing otherwise; and that, after being so corrected, the said speaker, H. Z. Burkhart, may have an opportunity to sign said minutes as corrected; that the same be returned to the defendant, Edward J. Curtis, as such secretary, or that, failing so to do, you show cause before the supreme court of Idaho, at the
17 court-room of said court, at Boise City, Idaho, at 2 o'clock p. m. of the 14th day of February, 1889, why you have not done so.

(Signed) H. W. WEIR,
Chief Justice of said Court.

Attest:
[L. S.] S. H. HAYS *Clerk.*

Endorsed as follows: Office of the marshal of the district of Idaho Ter. I certify that I received the within writ at 9.40 o'clock a. m., on the 14th day of February, 1889, and personally served the same on E. J. Curtis, at 9.50 o'clock a. m., on the 14th day of February, 1889, by leaving with said Curtis a copy of said writ, together with a certified copy of the complaint in the action named in the writ. Dated this 14th day of February, A. D. 1889. Ezra Baird, U. S. marshal, dist. of Idaho Ter. I further certify that I served the within writ by copy on Charles H. Reed, at 11.25 o'clock a. m., on the 14th day of February, 1889. Dated this 15th day of Feb.,
18 1889. Ezra Baird, U. S. marshal. Supreme court. H. Z. Burkhart *vs.* Charles H. Reed and E. J. Curtis. Writ of man-

date. Filed Feb. 14th, 1889. S. H. Hays, clerk. Arthur Brown, Lyttleton Price, S. B. Kingsburry, Texas Angel, pl'ff's att'ys.

19 In the Supreme Court of the Territory of Idaho. January Term, 1889.

H. Z. BURKHART, Speaker of the House of Representatives of Idaho Territory, Plaintiff,

vs.

CHARLES H. REED, Clerk of the House of Representatives of Idaho Territory, and Edward J. Curtis, Secretary of Idaho Territory, Defendants.

And now comes the said defendant, Edward J. Curtis, and files his separate demurrer to the alternative writ herein, and for grounds thereof alleges the following, which appear upon the face thereof:

1st.

That this court has no jurisdiction of the person of the defendant.

2nd.

That the court has no jurisdiction of the subject-matter of this action.

3rd.

That the plaintiff has not legal capacity to sue, in this—

1st. That the plaintiff was not at the time of the commencement of this action and is not now the speaker of the house of representatives of Idaho Territory.

2nd. That the plaintiff has no beneficial interest in the result of this action.

3rd. That if the plaintiff is now or was at the time of the commencement of this action speaker of the house of representatives of Idaho Territory this action should and must have been
20 brought upon the relation of the proper prosecuting officer.

4th.

That there is a misjoinder of parties defendant herein.

That this defendant, as secretary of Idaho Territory, is joined as codefendant with Chas. H. Reed, clerk of the house of representatives of Idaho Territory, that there is no community of interests or duties between said defendants and no act the performance of which this writ was issued to enforce could be jointly performed by them, and the writ herein requires different and separate acts from each of said defendants.

5th.

That several causes of action have been improperly joined herein, in this:

That the defendant, Chas. H. Reed, is required to do and perform certain acts and this defendant required — other and different acts, which acts have no relation to each other.

6th.

That it does not state facts sufficient to constitute a cause of action.

7th.

That the same is ambiguous and uncertain, in this: It does not appear what is required of this defendant; it does not clearly appear who is to make the alterations in the records and journals; it does not appear who has the possession of the journals and records of the house of representatives or who did have the possession at the time of the commencement of this action.

J. H. HAWLEY,
U. S. District Attorney, and
JOHN S. GRAY,
Att'ys for Defendant, Edward J. Curtis.

21 Endorsed as follows: In the supreme court of Idaho. H. Z. Burkhart, speaker house of representatives of Idaho T'y, plaintiff, *vs.* Charles H. Reed, chief clerk of the house of representatives of Idaho T'y, and Edward J. Curtis, secretary of Idaho T'y, defendant-. Demurrer to writ. Filed Feb. 18th, 1889. S. H. Hays, clerk. James H. Hawley, U. S. att'y, and John S. Gray, att'ys for def't Curtis.

22 In the Supreme Court of Idaho Territory. January Term, 1889.

H. Z. BURKHART, Plaintiff,
ag'st
CHARLES H. REED and EDWARD J. CURTIS, Defendants.

Now comes the said defendant, Charles H. Reed, and demurs to the alternative writ of mandate herein filed, on the grounds that it appears on the face thereof—

I. That this honorable court has no jurisdiction of the subject of this proceeding.

II. That the court has no jurisdiction of the person of this defendant in this proceeding.

III. That said H. Z. Burkhart has not legal capacity to sue in this proceeding.

IV. That there is a misjoinder of parties defendant, in that said alternative writ joins this defendant and Edward J. Curtis, the secretary of the Territory and an officer of the United States, as defendants.

V. That several causes of action have been improperly united, in that relief is demanded against this defendant on the ground that this defendant has in his possession certain proceedings of

the house of representatives of the Territory, and another alleged and distinct cause of action is stated against Edward J. Curtis, the secretary of the Territory, on the ground
23 that said Curtis, as such secretary, has possession of said proceedings.

VI. That the same does not state facts sufficient to constitute a cause of action or to entitle said plaintiff to relief by writ of mandate against this defendant.

VII. That the same is ambiguous, unintelligible, and uncertain, in this, that it is first averred therein, as a ground of relief against this defendant, that this defendant has in his possession the minutes of the proceedings sought to be reached herein, and it is also alleged therein, as a ground of relief against said defendant, Edward J. Curtis, secretary of the Territory, that this defendant has filed said minutes with said secretary (as this defendant is required by law to do), and that said secretary retains and preserves the same (as he is required by law to do).

ALBERT HAGAN AND
RICHARD Z. JOHNSON,
Attorneys for Charles H. Reed.

Endorsed as follows: In supreme court Idaho Territory. H. Z. Burkhart ag'st Charles H. Reed and Edward J. Curtis. Demurrer. Filed Feb. 18th, 1889. S. H. Hays, clerk. Albert Hagan & Richard Z. Johnson, att'ys. Chas. H. Reed.

24 In the Supreme Court of Territory of Idaho.

H. Z. BURKHART, Speaker of the House of Representatives of Idaho Territory, Plaintiff,

vs.

CHARLES H. REED, Chief Clerk of the House of Representatives of Idaho Territory, and EDWARD J. CURTIS, Secretary of Idaho Territory, Defendant.

And now comes Edward J. Curtis, one of the defendants herein, and moves this honorable court to quash the alternative writ of mandate herein upon the following grounds, which appear upon the face thereof:

1st.

That the court has no jurisdiction of the person of the defendant or the subject of this proceeding.

2nd.

That the plaintiff has no legal capacity to sue or institute this proceeding; that the said writ does not show such a beneficial interest in the result of this action as to entitle him to bring the same.

That if plaintiff is the officer alleged in said writ, and therefore entitled to institute these proceedings, the same should have been instituted upon the relation of the proper prosecuting officer.

25 3rd.

That there is a misjoinder of parties defendant.

This defendant, as secretary of Idaho Territory, is united as co-defendant with Charles H. Reed, chief clerk of the house of representatives; that there is no community of interest or duties between said defendants, and no act the performance of which this writ was issued to enforce can be jointly performed by them, and the requirements of the writ directs separate acts from each of the defendants.

4th.

That several causes of action have been improperly joined herein, in this:

That it is alleged that Charles H. Reed has the possession of the minutes, journals, and records, and he is directed to produce the same.

And it is alleged that the defendant, E. J. Curtis, has the possession thereof, being delivered to him by said defendant Reed (as the law requires) and a demand that the defendant produce them in court.

5.

That it does not state facts sufficient to constitute a cause of action.

6th.

That the same is ambiguous and uncertain, in this:

It does not appear clearly what is required of the said defendant, E. J. Curtis. It does not appear what alterations are required by the writ. It does not clearly appear who has the possession of said records, minutes, and journals or did have at the time of the
26 commencement of this proceeding.

J. H. HAWLEY,
U. S. District Attorney, and
JOHN S. GRAY,
Attorneys for Defendant, E. J. Curtis.

Endorsed as follows: In the supreme court of Idaho. H. Z. Burkhart, speaker of the house of representatives of Idaho Territory, plaintiff, *vs.* Charles H. Reed, chief clerk of the house of representatives of Idaho Territory, and Edward J. Curtis, sect'y of Idaho T'y, defendants. Motion to quash. Filed Feb. 18th, 1889. S. H. Hays, clerk. James H. Hawley, U. S. att'y, and John S. Gray, att'ys for def't Curtis.

27 In the Supreme Court of Idaho Territory. January Term, 1889.

H. Z. BURKHART, Plaintiff,
ag'st
CHARLES H. REED and EDWARD J. CURTIS, Defendants.

Now comes the said defendant, Charles H. Reed, and moves to quash the alternative writ of mandate herein filed, on the grounds that it appears on the face thereof—

I. That this honorable court has no jurisdiction of the subject of this proceeding.

II. That the court has no jurisdiction of the person of this defendant in this proceeding.

III. That said H. Z. Burkhart has not legal capacity to sue in this proceeding.

IV. That there is a misjoinder of parties defendant, in that said alternative writ joins this defendant and Edward J. Curtis, the secretary of the Territory and an officer of the United States, as defendants.

V. That several causes of action have been improperly united, in that relief is demanded against this defendant on the ground that this defendant has in his possession certain proceedings of the house of representatives of the Territory, and another alleged and distinct cause of action is stated against Edward J. Curtis, the secretary of the Territory, on the ground that said Curtis, as such secretary, has possession of said proceedings.

VI. That the same does not state facts sufficient to consti-
28 tute a cause of action or to entitle said plaintiff to relief by writ of mandate against this defendant.

VII. That the same is ambiguous, unintelligible, and uncertain, in this, that it first averred therein, as a ground of relief against this defendant, that this defendant has in his possession the minutes of the proceedings sought to be reached herein, and it is also alleged therein, as a ground of relief against said defendant, Edward J. Curtis, secretary of the Territory, that this defendant has filed said minutes with said secretary (as this defendant is required by law to do), and that said secretary retains and preserves the same (as he is required by law to do).

ALBERT HAGAN AND
RICHARD Z. JOHNSON,
Attorneys for Chas. H. Reed.

Endorsed as follows: In supreme court Idaho Territory. H. Z. Burkhart ag'st Charles H. Reed and Edward J. Curtis. Motion to quash. Filed Feb. 18th, 1889. S. H. Hays, clerk. Albert Hagan and Richard Z. Johnson, att'ys for Charles H. Reed.

29 In the Supreme Court of Idaho Territory. January Term, 1889.

H. Z. BURKHART, Speaker of the House of Representatives of Idaho Territory, Plaintiff,

vs.

CHAS. H. REED, Chief Clerk of the House of Representatives of Idaho Territory, and Edward J. Curtis, Secretary of said Territory, Defendants.

BERRY, *J.*, dissenting:

In this case I am constrained to dissent from the opinion of my associates sustaining the demurrer in this proceeding, and I deem it necessary and proper that the grounds of such dissent be stated. The object of the proceeding is to secure the issuance of a writ of mandamus against certain public officers. I shall at first confine my attention to this case, and afterwards refer to the similar case of Clough, president of the council, against Curtis, territorial secretary.

It is a familiar principle in law and practice that the allegations of a pleading demurred to shall, for the purpose of that proceeding, be taken as true. The allegations of this complaint are, therefore, to be taken as admitted. I copy the body of the complaint
30 in this case, together with the demurrer, and make them a part of this dissenting opinion.

The following is the complaint:

"The above-named plaintiff, H. Z. Burkhart, shows that he was the duly elected speaker and is now the actual and acting speaker of the house of representatives of Idaho.

That defendant, Chas. H. Reed, is chief clerk of the house of representatives and Edward J. Curtis is the secretary of the Territory of Idaho, and for cause of action for mandamus alleges—

That the said Chas. H. Reed has in his possession, as such chief clerk, the minutes of proceedings of said house of representatives for the last day of the fifteenth session.

That the same has not been signed by plaintiff, H. Z. Burkhart, the speaker, and the defendant Reed refuses to present the same to said speaker for his signature, but that said defendant Reed, in preparing a record of said minutes, omitted a part of said proceedings.

That, in truth, on the sixtieth day of said session, Feb'y seventh, 1889, just before 12 o'clock p. m., the said speaker inquired if there was any further business; that the clerk replied that there was none. Said speaker then requested the journal to be read, which was done by the clerk.

That thereupon the proceedings, as recorded in said journal, were approved by the house of representatives and by said speaker declared to be approved.

That thereupon, the hour of 12 o'clock midnight having arrived and passed, the speaker did, after said hour, declare and announce

that, the time having arrived when, by act of Congress, the
31 session of the Legislature must close, therefore he, as speaker, thereby then and there declared said session closed and adjourned without day.

That no objection was made by the house or any member thereof to the said adjournment, or to the authority of the said speaker to declare the same adjourned, but all acquiesced therein; that after the speaker and part of the members had retired from the room a portion of the members pretended to elect a speaker *pro tem.*, to wit, one George P. Wheeler, and assumed and pretended to proceed with the pretended legislation.

That a large number of assumed and pretended bills were assumed to be passed by the remaining members and pretended to become the acts of the Legislature.

That all pretended proceedings on said last day, after the speaker retired, were after 12 o'clock midnight and after said house had been adjourned.

That in preparing the journal of said proceedings said clerk omitted to state and did not state that the minutes were read and approved by the house; that the speaker declared the house adjourned; that the house was adjourned by the acquiescence and assent of all the members, and that the speaker *pro tem.* was elected after the said adjournment and the subsequent pretended legislation had and done was after such adjournment; that said chief clerk, Chas. H. Reed, pretends and asserts that he has made up the journal of said last day's proceedings; has secured the signature of said Wheeler, as speaker *pro tem.*, and delivered the same to Edward J. Curtis, secretary of the Territory, but the minutes of proceedings as pre-
32 pared by said Reed omit the matter as hereinbefore alleged to be omitted and is a false statement or record of said proceedings; that the said secretary, Edward J. Curtis, treats and wrongfully holds out the minutes so signed by said Wheeler and the chief clerk as the true minutes, record, and journal of the house of representatives, and is recording the same as such journal and threatens to certify them to Congress as the journal of said house of representatives; that he knew that said proceedings of the last day were not signed by the speaker.

That plaintiff, by his attorney, Lyttleton Price, has filed, to wit, on the 9th day of February, 1889, and before the same were recorded with said secretary, Edward J. Curtis, a demand in writing that he do not record said proceedings and a protest against the same, on the ground that they were not the correct record of the proceedings of the house of representatives.

That the plaintiff did, on the 8 day of February, 1889, demand of the defendant, Chas. H. Reed, that he present said minutes of proceedings to the plaintiff for signature; that he failed and refused and still fails and refuses to so produce the same.

That the rules and practice of said house of representatives require that the said defendant Reed present all the minutes of proceedings thereof to the plaintiff, as such speaker, for his signature.

Wherefore plaintiff prays that said Edward J. Curtis may pro-

duce in court the original minutes, record, or proceedings delivered by said Reed to said Curtis, and that said defendant, Chas. H. Reed, be required to prepare said journal according to the facts as hereinbefore set forth and state that said minutes were read and approved; that after the hour of 12 o'clock midnight of February 7th, 1889, the speaker declared said house adjourned *sine die;*
33 that the house did not object to said adjournment, but acquiesced therein and all of the other proceedings hereinbefore stated, and that such journal be handed to the speaker to sign, and thereafter, when so amended and completed, to be delivered to said secretary of the Territory as the minutes of the proceedings of said last day, or that said defendant show cause forthwith why said defendants should not do so."

Demurrer.

" Now comes the defendant, Chas. H. Reed, and demurs to the alternative writ of mandate herein, filed on the grounds that it appears on the face thereof—

1. That this honorable court has no jurisdiction of the subject of this proceeding.

2. That the court has no jurisdiction of the person of the defendant in this proceeding.

3. That said H. Z. Burkhart has not legal capacity to sue in this proceeding.

4. That there is a misjoinder of parties defendant, in that said alternative writ joins this defendant and Edward J. Curtis, the secretary of the Territory and an officer of the United States, as defendants.

5. That several causes of action have been improperly united, in that relief is demanded against the defendant on the ground that this defendant has in his possession certain proceedings of the house of representatives of the Territory, and another alleged and distinct cause of action is stated against Edward J. Curtis, the secretary of the Territory, on the ground that said Edward J. Curtis, as such secretary, has possession of said proceedings.

6. That the same does not state facts sufficient to consti-
34 tute a cause of action or to entitle said plaintiff to relief by writ of mandamus against this defendant.

7. That the same is ambiguous, unintelligible, and uncertain, in this, that it first averred therein, as a ground of relief against this defendant, that this defendant has in his possession the minutes of the proceedings sought to be reached herein as a ground of relief against the said defendant, Edward J. Curtis, secretary of the Territory; that this defendant has filed said minutes with said secretary (as the defendant is required by law to do), and that said secretary retains and preserves the same (as he is required by law to do)."

Not having had an opportunity until the present moment to see or know the tenor or effect of the points made in the opinion of my associates upon the bench (beyond the bare fact that the demurrer was to be sustained), the scope of my observations may be, perhaps,

beyond the required limits made necessary by the opinion dissented from; but I will follow in some degree the order of the argument of the leading counsel in support of the demurrer.

1. There is, I think, no room for a serious question that this court has full and complete power to issue the writ as prayed; also that it has jurisdiction of the subject-matter of the complaint. The power to issue writs of mandamus must be vested somewhere, and the Legislature, in plain and unequivocal terms, has conferred it upon this court. It seems to me too plain to admit of any doubt. Section 1866, U. S. Rev. Stat., says: "The jurisdiction, both appellate and original, of the courts provided for in sections 1907 and 1908 shall be as limited by law;" and in 1907: "The judicial power in New Mexico, Utah, Washington, Colorado, Dakota, Idaho,
35 Montana, and Wyoming shall be vested in the supreme court, district courts, and probate courts, and in justices of the peace."

Revised Statutes of Idaho, secs. 3815 and 3816 of title two, entitled "of the supreme court," are as follows, viz: "The jurisdiction of this court is of two kinds—first, original; and, second, appellate. Its original jurisdiction extends to the issuance of writs of mandate, review, prohibition, *habeas corpus*, and all writs necessary to the exercise of its appellate jurisdiction."

Section 3817 defines its appellate jurisdiction.

2. So of the jurisdiction of the court over the persons of both defendants. It makes no difference that one of them, the secretary of the Territory, is appointed by the President of the United States. He is not, therefore, the executive branch of the United States Government, nor even of the Territory of Idaho. Congress has declared, in the organic act of the Territory, that the executive power of the territorial government is vested in the Governor alone. The secretary is no more above the laws than the marshal, the U. S. district attorney, or the deputies of either of these officers, or the most humble person in the land, as in the United States *vs.* Kendall, Postmaster General, 12 Peters, U. S. 608, and United States *vs.* Schurz, Secretary of the Interior, 102 U. S., 372. The authorities are numerous and clear that even Cabinet officers are equally subject to the mandate of the courts with any other person; but it is not necessary to cite those authorities. The one principally relied on by the defendants is that of Marbury *vs.* Madison; but that case was decided on other grounds than the official character of the party defendant. Congress supplied the defect found in the
36 law in that case by conferring the needed power to issue the writ on the courts of the District of Columbia. Since then Cabinet officers have constantly been held subject to the jurisdiction of courts with no more power than this court. If the court can issue a writ at all, and of which there is no doubt, no case can reasonably be supposed, unless it be the case of Clough *vs.* Curtis, now pending in this court, involving a party of this controversy, calling for the exercise of this power more emphatically than do the admitted facts in this case at bar. If Cabinet officers are thus within the jurisdiction of the court there is certainly no ground for an in-

ferior officer of a Territory to claim greater immunity simply because he is appointed by the President. They also are appointed by the President, and stand nearer to him than any officer of the Territory. The counsel for the secretary practically admits this by saying that a State court cannot issue a writ of mandamus to an officer commissioned by the United States, except as they are authorized by the United States. I think the counsel is mistaken in this, and that he will find that while the rule, as to State courts, is not universal, it applies only where the officer's duties are purely Federal, as in the case of a United States land officer, but not in such case as this, where the officer is not in the service of the United States, but only an inferior officer of the Territory; but even if it were otherwise this court has Federal jurisdiction as well as territorial. I suppose that fact will not be disputed. I can see nothing valid in the objection that a territorial officer is not amenable to the laws because he is commissioned by the President of the United States.

3. The plaintiff has an unquestionable power to sue. He
37 was and still is the speaker of the house, and as such had and still has the exclusive right to the performance of the duties set forth in the complaint. The public requires it of him, even if no executive or administrative officer can be found willing to assist him to his own and the public right. If that right is invaded, as by the defendants' demurrer it is admitted to be in this case, he may invoke the aid of this tribunal to enable him to perform his sworn duties to the public. Any member of that Legislative body may interpose to preserve the lawful records of its proceedings and prevent the dearest rights of the community, the very foundations of its laws, the evidence upon which the interests of thousands depend, from being in a wholesale manner falsified and debauched. It was shown on the argument that in a matter vital to the public any citizen may institute proceedings by mandamus.

High on Special Remedies, secs. 431–433.
U. S. *vs.* Hall, 91 U. S., 354.
Third Dillon, 521.

In the United States *vs.* Hall the Supreme Court of the United States held that mandamus was correctly brought by a citizen of Council Bluffs to compel the Union Pacific R'y Co. to fulfil its contract with the United States to build a bridge across the Missouri river. This case meets the objection raised by the demurrer on this point without at all referring to the official character and rights of this plaintiff. The contract with the United States on the part of the Union Pacific R'y Co. was one to enforce which the attorney general would have been a proper officer to sue out the writ, and might have done it, but as he did not do it the court held that any other citizen might do so.

38 4. It is also contended that there is a misjoinder of defendants. No, there is no misjoinder if the facts are as stated in the complaint, and the demurrer admits them. What papers the secretary has are admitted to be unsigned, mutilated, and fraudu-

lent papers and are not "archives of the Legislature" (which alone the secretary has a right to receive) any more than would be the records of a base-ball club or any other unlegislative association or gathering. Of this he was and is duly apprized. If what is admitted to be true are real facts the secretary is aiding and abetting the clerk in his attempt to foist upon the Territory as records what are not records, to be used, if at all, as conclusive evidence to establish as facts what are not facts, and that legislative acts were done which it is admitted were never done by a legislature. The joining by these two officers in the perpetration of a grave wrong, one doing one part and the other completing it, makes them both *particeps* and subject to the same process if necessary for its correction and prevention. In this case it is necessary. The secretary must produce the fraudulent papers, abstain from treating them as genuine, or, as he threatens to do, from recording them and sending them to Congress and the several officers of the U. S. Government as genuine, or in any way to act upon them until the clerk shall write them truthfully and they shall have the necessary official sanction of the chief officer of the house whose proceedings they profess to record, and until they thereby become real records and archives of the Legislature there is no misjoinder.

5. Proceeding in the order of the attorney for the secretary, we may here inquire whether the session of the Legislature did, in fact, expire with the 7th day of February, 1889?

39 The inquiry is not necessary, perhaps, for the fact is admitted. But let us look into the facts and the law. It met on the 10 day of December, 1888. That was its first legislative day, and so appears on its journals. The session began with the beginning of that day. The claim that it did not begin till noon of that day, and hence that the first day should end at noon of the next day, and so for each day through its session to the sixty-first day, simply because the Territorial Legislature had enacted that the Legislature should meet at noon of the day appointed for the meeting, cannot for a moment be maintained. If such a thing could be, there would be no meridian to the legislative day. They met at 12 o'clock "m." Its noon would be midnight. The law takes no note of fractions of a day. Congress had said how long the session should continue, and it was not competent for the Territorial Legislature to prolong the time. This act of Congress is in the following words, and has all the force of a constitutional provision: U. S. Rev. Stats., sec. 1852, says: "The sessions of the Legislative Assemblies of the several Territories shall be limited to 60 days' duration."

The act of the Legislature fixing the hour recognizes the second Monday of December as the first day of the session. The section, Rev. Stats. Idaho, is as follows: "Sec. 122. At the hour of 12 o'clock m. on the day appointed for the meeting of any regular session of the Legislature the presiding officer, or, in his absence, the chief clerk of each house of the last session, must call the same to order and preside until the presiding officer is chosen, or, in case of the absence of both of those officers, the senior member present must

perform said duties, all members elect- present having cer-
40 tificates of election from the clerk of the board of county commissioners of their respective counties, and no other person has the right to partieipate in the organization of the respective houses. Neither house must organize or transact business, but must adjourn from day to day until a majority of all the members authorized by law to be elected are present."

It does not pretend to extend the time fixed by Congress, but merely fixes the hour of meeting, and declares it shall meet at noon of that day. There is nothing whatever in the statute or either of them, or in the construction given them by either branch of the Legislature in the numbering of the days of the session, to justify this extraordinary claim. Both bodies counted in their journals the 10th day of December as one day of the session and numbered from it. Even the bodies which met, as is alleged, on the eighth day of February admit the hollowness of this pretence by claiming its acts to have been done on the 7th day of February, instead of the day on which it is admitted they were, in fact, done. They themselves seek to take shelter under a false date. Were there anything in this claim, no reason is apparent why acts done before noon of the eighth should be antedated a day to bring them within the law.

6. It was clearly the duty of the presiding officers of both houses to obey the law, and when the constitutional time had expired to declare the session ended. Such action is abundantly sustained by both authority and precedent. In this case the acts of both presiding officers were acceded to by both houses. What occurred in the house also occurred in the council. When the minutes
41 of the last day had been read and formally approved in the house by the members in session, and the clerk publicly announced that there was no more business before the house, and the speaker at one o'clock in the forenoon of the eighth of February declared to the listening house that the hour fixed by Congress for adjournment had arrived and passed, and that in view of such fact he, as presiding officer, declared that session ended, and there was no objection or appeal from this decision, that session was ended. Three things concur to give force and effect to the solemnity of the act—first, the expiration of the time fixed by Congress; second, the official action of the presiding officer; and, third, the assent and concurrence of the entire body. Whether under such conditions the house broke up, as is conceded it did, or all members remained in their places, is of no moment. The regular session was ended, and if before the meeting of the next Legislature that body could reconvene it must be in extra session called pursuant to law.

After that moment whatever was done by certain members was not done by a legislative body, and all its acts pretending to be legislative acts are, in fact, absolutely null and void.

7. It follows from the fact that this so-called Legislature was not a Legislature, and those so-called records are not in any sense legislative records, that the arguments and authorities upon the power of the court to correct or supervise acts done by a real Legislature,

or the effect for any purpose of real legislative records, or whether such real records can or cannot be impeached collaterally, and any and all questions, and I think either in the majority opinion of this court or otherwise the existence of a real Legislature and based on a presumption founded on real records, are wholly irrelevant or do not bear on this case. These questions comprise most of the
42 arguments of these demurrants and have no bearing on the case before this court. They are collateral merely. Those papers are not called in question collaterally, but directly by proceedings provided by law to determine whether they are, in fact, records of a legislative body or not, and if not records to have them or such of them as are not records so declared, and to have the spurious portions expunged and the true records substituted. This is a plain and simple duty of the court for which it was created and armed with plenary power.

8. These considerations apply as well to the case of Clough, president of the council, *vs.* Curtis, secretary of the Territory, as to this case. The facts in the two cases are, in the main, the same, only that like proceedings took place in the council as in the house, and, except in that case, a fact is also alleged and admitted by the demurrer that the true record was mutilated; that three leaves of the genuine records which had actually been written up and approved before adjournment were removed from the records and their places supplied with matter falsely purporting to be a record of proceedings by the Legislature before it had expired.

The high-handed character of those acts should be investigated and should not be hidden. If those grave charges be not in fact true, let them be denied, and let both sides be admitted to their proof. The demurrer in both cases should be overruled.

43 TUESDAY, *Feb.* 12*th*, 1889.

Supreme Court Idaho Territory.

H. Z. BURKHART, Speaker, &c.,
vs.
CHAS. H. REED, Chief Clerk, &c. } Application for Writ of Mandate.

Now, on this day, on motion of the petitioner herein, it is ordered that the hearing herein be, and it is hereby, set for Feb. 13th, at 2 o'clock p. m.

WEDNESDAY, *Feb.* 13*th*.

H. Z. BURKHART, Speaker, &c.,
vs.
CHAS. H. REED, Chief Clerk, &c. } Application for Writ of Mandate.

This day comes the petitioner herein and moves the court for leave to amend the complaint herein so as to make Edward J. Curtis, secretary of Idaho, a party defendant herein, and also to charge him with proper words, &c.; and said motion having been duly heard and considered, it is now ordered that said motion be, and the same is hereby, granted.

And now, on motion of Lyttleton Price, Esq., attorney for petitioner, it is ordered that the name of Arthur Brown, Esq., as counsel for petitioner, be entered herein; and it is further ordered that the further hearing herein be postponed until the further order of this court.

THURSDAY, *Feb.* 14*th*, 1889.

H. Z. BURKHART, Speaker, &c.,
vs.
CHAS. H. REED, Chief Clerk, &c., & E. J. CURTIS, Secretary, &c.
} Application for Writ of Mandate.

44 On motion of Jas. H. Hawley, Esq., U. S. district attorney, it is ordered that the further hearing herein be postponed until Monday, the 18th inst.

And, on motion of petitioner's attorney, it is ordered that leave be, and the same is hereby, granted to petitioner to verify the amended complaint herein.

THURSDAY, *Feb.* 21*st*, 1889.

H. Z. BURKHART, Speaker, &c.,
vs.
CHAS. H. REED, Chief Clerk, &c., & E. J. CURTIS, Secretary, &c.
} Application for Writ of Mandate.

This day this cause came on for hearing, and being finished, the further hearing is postponed until Monday, the 25th inst.

MONDAY, *Feb.* 25*th*, 1889.

H. Z. BURKHART, Speaker, &c.,
vs.
CHAS. H. REED, Chief Clerk, &c., & E. J. CURTIS, Secretary, &c.
} Application for Writ of Mandate.

This day the hearing herein was resumed, and, not being completed, was postponed until to-morrow, the 26th inst.

TUESDAY, *Feb.* 26*th*, 1889.

H. Z. BURKHART, Speaker, &c.,
vs.
CHAS. H. REED, Chief Clerk, &c., & E. J. CURTIS, Secretary, &c.
} Application for Writ of Mandate.

45 This day the hearing herein was resumed, and, not being completed, the further hearing of the same is postponed until to-morrow, the 27th inst.

And it is agreed by counsel that the argument herein cover the case of Clough *vs.* Curtis as to the demurrer and motion to quash the writ.

WEDNESDAY, *Feb.* 27*th*, 1889.

H. Z. BURKHART, Speaker, &c.,
vs.
CHAS. H. REED, Chief Clerk, &c., & E. J. CURTIS, Secretary, &c.
} Application for Writ of Mandate.

This day the hearing herein was resumed, and, being finished, was taken under advisement by the court.

MONDAY, *March* 11*th*, 1889.

H. Z. BURKHART, Speaker of the House of Representatives of Idaho Territory, Pl'ff,
vs.
CHARLES H. REED, Chief Clerk of the House of Representatives of Idaho Territory, and Edward J. Curtis, Secretary of Idaho Territory, Def'ts.
} Application for Writ of Mandate.

Now, on this day, this cause having been heretofore submitted and taken under advisement by the court, and all and singular the law and premises being by the court here seen, heard, understood, and fully considered, the opinion of the court herein is delivered by Chief Justice Weir, to the effect that the demurrer heretofore interposed to the complaint herein be sustained, Justice Berry dissenting.

46 Whereupon it is now considered, ordered, adjudged, and decreed by the court that said demurrer be, and the same is hereby, sustained.

And now comes Arthur Brown, Esq., attorney for plaintiff, and moves the court to allow an appeal herein to the Supreme Court of the United States, which appeal is hereby duly allowed; and it is further ordered that the penalty of the bond on such appeal be fixed at $500 00.

47 In the Supreme Court of the Territory of Idaho. January Term, A. D. 1889.

H. Z. BURKHART, Speaker of the House of Representatives of Idaho Territory, Plaintiff,
vs.
CHAS. H. REED, Chief Clerk of the House of Representatives of Idaho Territory, and Edward J. Curtis, Secretary of said Territory, Defendants.
} Opinion.

WEIR, *C. J.:*

This is an application by the plaintiff for a writ of mandate to be directed to the defendants above named. The grounds upon which the writ is asked are fully set out in the petition of the plaintiff, which is as follows:

"The above-named plaintiff, H. Z. Burkhart, shows that he was the duly elected speaker and is now the actual and acting speaker of the house of representatives of Idaho.

"That defendant, Charles H. Reed, is chief clerk of the house of representatives and Edward J. Curtis is the secretary of the Territory of Idaho, and for cause of action for mandamus alleges—

"That the said defendant, Chas. H. Reed, has in his possession, as such chief clerk, the minutes of the proceedings of said house of representatives for the last day of the fiftieth session.

48 "That the same has not yet been signed by plaintiff, H. Z. Burkhart, the speaker, and said defendant refuses to present the same to said speaker for his signature, but that said defendant Reed, in preparing a record of said minutes, omitted a part of the said proceedings.

"That, in truth, on the sixtieth day of the said session, Feb. 7th, 1889, just before 12 o'clock p. m., the said speaker inquired if there was any further business; that the clerk replied there was none. Said speaker then requested the journal to be read, which was done by the clerk.

"That thereupon the proceedings, as recorded is said journal, were approved by the house of representatives and by said speaker declared to be approved.

"That thereupon, the hour of 12 o'clock midnight having arrived and passed, the speaker did after said hour declare and announce that the time having arrived when by act of Congress the session of the Legislature must close, therefore he, as speaker, thereby then and there declared said session closed and adjourned without day.

"That no objection was made by the house or any member thereof to the said adjournment or to the authority of said speaker to declare the same adjourned, but all acquiesced therein.

"That after the speaker and a part of the members had retired from the room a portion of the members pretended to elect a speaker *pro tem.*, to wit, one George P. Wheeler, and assumed and attempted to proceed with pretended legislation.

"That a large number of assumed and pretended bills were assumed to be passed by the said remaining members and pretended to become the acts of the Legislature.

49 "That all pretended proceedings on said last day after the speaker retired were after 12 o'clock midnight and after said house had been adjourned.

"That in preparing the journal of said proceedings said clerk omitted to state and did not state that the minutes were read and approved by the house; that the speaker declared the house adjourned; that the house was adjourned by the acquiescence and assent of all the members, and that the speaker *pro tem.* was elected after the said adjournment and the subsequent pretended legislation had and done after such adjournment.

"That said chief clerk, Chas. H. Reed, pretends and asserts that he has made up the journal of said last day's proceedings; has procured the signature of said Wheeler as speaker *pro tem.* and de-

livered the same to Edward J. Curtis, secretary of the Territory; but the minutes of proceedings as prepared by said Reed omit the matter, as hereinbefore alleged to be omitted, and is a false statement or record of the said proceedings.

"That the said Secretary, Edward J. Curtis, treats and wrongfully holds out the minutes so signed by said Wheeler and the chief clerk as the true minutes, record, and journal of the house of representatives, and is recording the same as such journal, and threatens to certify them to Congress as the journal of said house of representatives; that he knew that said proceedings of the last day were not signed by the speaker.

"That plaintiff, by his attorney, Lyttleton Price, has filed, to wit, on the 9th of February, 1889, and before the same were recorded with said secretary, Edward J. Curtis, a demand in writing that he do not record said proceedings and a protest against the same
50 on the ground that they were not the correct record of the proceedings of the house of representatives.

"That the plaintiff did, on the 8th day of February, 1889, demand of the defendant, Chas. H. Reed, that he present said minutes of proceedings to the plaintiff for signature; that he failed and refused and still fails and refuses to so produce the same.

That the rules and practice of said house of representatives require that the said defendant Reed present all the minutes of proceedings thereof to the plaintiff as such speaker for his signature.

Wherefore, plaintiff prays that said Edward J. Curtis may produce in court the original minutes, record, or proceedings delivered by said Reed to said Curtis, and that said defendant, Chas. H. Reed, be required to prepare said journal according to the facts as hereinbefore set forth and state that said minutes were read and approved; that after the hour of 12 midnight of February 7th, 1889, the speaker declared said house adjourned *sine die;* that the house did not object to such adjournment, but acquiesced therein and all of the other proceedings hereinbefore stated, and that such journal be handed to the speaker to sign, and thereafter, when so amended and completed, to be delivered to said secretary of the Territory as the minutes of the proceedings of said last day, or that said defendants show cause forthwith why said defendants should not do so."

Upon this petition the court granted an alternative writ of mandate, which was made returnable on the 14th day of February, 1889, to which the defendant demurred and assigned for grounds of demurrer the following:

51 "1st. That this court has no jurisdiction of the person of the defendant.

"2nd. This this court has no jurisdiction of the subject-matter of this action.

"3rd. That the plaintiff has not legal capacity to sue, in this:

"1st. That the plaintiff was not, at the time of the commencement of this action and is not now, the speaker of the house of representatives of Idaho Territory.

"2nd. That the plaintiff has no beneficial interest in the result of this action.

"3rd. That if the plaintiff is now or was at the time of the commencement of this action speaker of the house of representatives of Idaho Territory this action should and must have been brought upon the relation of the proper prosecuting officer.

"4th. That there is a misjoinder of parties defendant herein; that this defendant, as secretary of Idaho Territory, is joined as co-defendant with Chas. H. Reed, clerk of the house of representatives of Idaho Territory; that there is no community of interests or duties between said defendants, and no act the performance of which this writ was issued to enforce could be jointly performed by them, and the writ herein requires different and separate acts from each of said defendants.

"5th. That several causes of action have been improperly joined herein, in this: That the defendant, Chas. H. Reed, is required to do and perform certain acts and this defendant required — other and different acts, which acts have no relation to each other.

"6th. That it does not state facts sufficient to constitute
52 a cause of action.

"7th. That the same is ambiguous and uncertain, in this: It does not appear what is required of this defendant; it does not clearly appear who is to make the alterations in the records and journals; it does not appear who has the possession of the journals and records of the house of representatives or who did have the possession at the time of the commencement of this action."

The jurisdiction of this court to issue the writ is derived from section 3816 of the Revised Statutes, which is as follows: "Its original jurisdiction extends to the issuance of writs of mandate, review, prohibition, *habeas corpus*, and all writs necessary to the exercise of its appellate jurisdiction."

We do not deem it necessary to notice the various grounds of demurrer as hereinbefore set forth, but will confine our attention to the 6th ground: "That it does not state facts sufficient to constitute a cause of action." The disposition of the case upon this ground disposes of it according to our view and renders it unnecessary for us to consider any further point.

The petition or complaint alleges that the plaintiff was the duly elected speaker and is now the actual and acting speaker of the house of representatives of Idaho; that the defendant, Charles H. Reed, is chief clerk of the house of representatives and Edward J. Curtis is the secretary of the Territory of Idaho; that Charles H. Reed has in his possession, as such chief clerk, the minutes of the proceedings of the said house of representatives for the last day of the fifteenth session; that he refuses to present the same
53 to the plaintiff for his signature, and has prepared a record of said minutes omitting a part of the said proceedings. The petition then proceeds to set forth certain facts which it alleges took place in the house of representatives, but that the defendant Reed has omitted such proceedings from the minutes, and proceeds to allege

that the said chief clerk has made up a journal of said last day's proceedings; has procured the signature of one Wheeler as speaker *pro tem.*, and has delivered the same to Edward J. Curtis, secretary of the Territory; that the minutes of proceedings, as prepared by said Reed, omit the matters alleged in the said petition to have been omitted, and is a false statement or record of the proceedings; that the secretary, Edward J. Curtis, wrongfully holds out the minutes so signed by Wheeler and the chief clerk as the true journal of the house of representatives, and is recording the same as such journal, and threatens to certify them to Congress as the journal of the house of representatives, although he knows that the said proceedings were not signed by the plaintiff.

While it is true that a general demurrer admits the truth of facts as stated in the pleadings, yet it is equally true that facts not well pleaded and mere conclusions of law are not admitted by a demurrer. There is no pretence that the averments in this paragraph are mere conclusions of law or that the facts are not well stated. The contention is that the facts stated, if established, would be immaterial and irrelevant, and would constitute no valid ground upon which this court could act. In plain language, the facts, if admitted true, would not constitute a cause of action.

Bliss on Code Pleading, sec. 418.

Moreover, "a public statute of which we are bound *ex*
54 *officio* to take notice, as well as to the time it went into effect as to its provisions, this allegation is not admitted or to be taken to be true by the demurrer. The existence or the time of the taking effect of a public act cannot be put in issue or admitted or denied by the pleadings, but must be determined by the judges themselves."

Attorney General *v.* Foote, 11 Wisconsin, 16.

It seems to be well settled that the courts will take judicial notice of the journal of a legislative body to determine whether an act of a Legislature is constitutionally passed, and for the purpose of ascertaining what was done by the Legislature. A journal, according to the petition, has been filed with the secretary of the Territory, and is, therefore, a public record, and such a record as this court is bound to take judicial notice of. There is, then, no need of stating what appears upon the journals of the Legislature or what does not appear. Such matters are judicially noticed without averment. No issue of fact can be taken upon what a court is required as a court to know. These averments in the pleading, even if true, contain no issuable fact, and in such a case a demurrer is the proper remedy.

The petition concedes that a journal has been filed by the clerk upon the adjournment of the Legislature with the secretary of the Territory, but alleges that the journal was not properly made up by him. Sec. 124 of the Revised Statutes of Idaho provides that 'the clerks, at the close of each session of the Legislature, must mark, label, and arrange all bills and papers belonging to the
55 archives of their respective houses, and deliver them, to-

gether with the books of both houses, to the secretary of the Territory, who must certify to the reception of the same."

We have said that the petition concedes that a journal has been delivered to the secretary of the Territory and that the secretary of the Territory treats such journal as the journal of the Legislature. By section 190 of the Revised Statutes the secretary of the Territory is charged with the custody of such journals. Sec. 1844 of the organic act provides that the secretary shall record and preserve all the laws and proceedings of the Legislative Assembly.

We are now invited to direct the secretary to produce before this court the journal which was delivered to him by the clerk of the house of representatives in order that the plaintiff, a member of the Legislature, may be allowed to make certain corrections therein, and that after such corrections are made the secretary receive the corrected journal as the journal of the Legislature delivered to him by the clerk thereof. The production of the journal would be a mere idle proceeding, unless for the purpose of allowing the court to pass upon the question of fact as to whether this book is or is not the journal of the Legislature. The journal itself is a public record and open for public inspection, and any citizen of the Territory is entitled to inspect the same; so that its production can only be asked for in order to allow certain corrections to be made. Hence, if this court comes to the conclusion that it cannot allow such corrections to be made, then the production of the journal merely for inspection is wholly unnecessary.

56 There is no dispute that the law places no obligation upon Curtis as secretary other than that he must receive the journal from the clerks of the Legislature and record the same. From the language of section 124 of the Revised Statutes it is clearly the duty of the clerk to make up such records as he deems proper to be delivered to the secretary and deliver the same. This he has done, and that is the only duty imposed upon him by statute. The law presumes he has done this correctly, and if not he is amenable to the criminal code of this Territory. The question whether the papers so delivered by the clerk to the secretary are correct or not is one which this court cannot entertain. The papers so delivered either are or are not the journal of the Legislature. If they are, then this proceeding necessarily fails. If they are not, then it is not the province of this court, nor within the power of this court, to question them or to make a journal for the Legislature. That power is vested in the Legislature alone, and is not a power conferred upon the courts.

It is contended with great zeal by the learned counsel for the relator that the journal so delivered is not the journal of the Legislature; hence the relator has a right to correct it so that, in his judgment, it may become the journal of the Legislature, and, as so corrected, that the same be filed with the secretary. This position is wholly untenable. Certainly this court would not correct so important a document as the journal of a Legislature, or what purports to be the journal of a Legislature, upon the unsupported statement and recollection of one person only without hearing evidence

62 In the Supreme Court of Idaho Territory.

H. Z. BURKHART, Speaker of the House of Representatives of the 15th Session of the Legislature of Idaho, Plaintiff,
vs.
C. H. REED, Chief Clerk of the House of Representatives, and E. J. Curtis, Secretary of the Territory of Idaho, Defendants.
} Citation.

United States of America to said C. H. Reed and Edward J. Curtis, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October next, pursuant to and to answer an appeal in the above-entitled suit, in which H. Z. Burkhart, speaker of the house of representatives of the 15th session of the Legislature of Idaho, is appellant and you are appellee, to show cause, if any there be, why a judgment of the supreme court of Idaho Territory rendered against the said appellant in said appeal should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Hugh W. Weir, chief justice of the Territory of Idaho, this 18th day of March, 1889.

H. W. WEIR,
Chief Justice of Idaho.

Service of the foregoing citation admitted this nineteenth day of March, 1889.

RICHARD Z. JOHNSON,
Attorney for Charles H. Reed,
JAMES H. HAWLEY,
U. S. Att'y, and
JOHN S. GRAY,
Attorneys for E. J. Curtis.

[Endorsed:] In the supreme court Idaho Territory. H. Z. Burkhart, speaker, etc., *vs.* C. H. Reed, etc., and E. J. Curtis, etc. Citation.

63 In the Supreme Court of Idaho Territory.

H. Z. BURKHART, Speaker of the House of Representatives of the 15th Session of the Legislature of Idaho, Plaintiff,
vs.
C. H. REED, Chief Clerk of the House of Representatives, and E. J. Curtis, Secretary of the Territory of Idaho, Defendants.
} Undertaking.

Know all men by these presents that we, H. Z. Burkhart, of Hailey, Idaho, and T. E. Picotte, Andrew J. McGowan, Henry R.

Plughoff, and Ronello W. Berry, also of Hailey, Idaho, are held and firmly bound unto Charles H. Reed and Edward J. Curtis in the full and just sum of five hundred dollars to be paid to the said Charles H. Reed and Edward J. Curtis, their certain attorneys, executors, administrators, heirs, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 18th day of March, in the year of our Lord one thousand eight hundred and eighty-nine.

Whereas lately, at a term of the supreme court of Idaho
64 Territory, on the 11th day of March, A. D. 1889, in a suit pending between H. Z. Burkhart, speaker of the house of representatives of the 15th session of the Legislature of Idaho Territory, and C. H. Reed, chief clerk of the house of representatives of the 15th session of the Legislature of Idaho Territory, & Edward J. Curtis, secretary of Idaho Territory, judgment was rendered against the said appellant and in favor of the said respondent, and the said appellant having obtained the allowance of an appeal from said supreme court of Idaho Territory to the Supreme Court of the United States to reverse the said judgment in the aforesaid suit, and a citation directed to the said C. H. Reed and E. J. Curtis citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., the second Monday of October next:

Now, the condition of this obligation is such that if the said H. Z. Burkhart shall prosecute the said appeal to effect and answer all damages and costs if he fail to make his said plea good, then the above obligation is void; else to remain in full force and virtue.

(Signed) H. Z. BUKKHART. [SEAL.]
P. E. PICOTTE. [SEAL.]
ANDREW J. McGOWAN. [SEAL.]
HENRY R. PLUGHOFF. [SEAL.]
RONELLO W. BERRY.

TERRITORY OF IDAHO, } *ss:*
County of Alturas, }

T. E. Picott, Andrew J. McGowan, Henry R. Plughoff, and Ronello W. Berry, whose names are subscribed as sureties to the foregoing undertaking, being each duly and severally sworn,
65 each for himself says that he is a resident and freeholder of the said county of Alturas, in the Territory of Idaho, and that he is worth the amount specified in said undertaking as the penalty thereof over and above all his just debts and liabilities, exclusive of property exempt from execution.

(Signed) ANDREW J. McGOWAN.
T. E. PICOTTE.
H. R. PLUGHOFF.
R. W. BERRY.

The foregoing bond approved by me this 18 day of March, A. D. 1889.

(Signed) H. W. WEIR,
Chief Justice Idaho Ter.

[Endorsed:] In the supreme court Idaho Territory. H. Z. Burkhart, speaker, etc., *vs.* C. H. Reed, etc., and E. J. Curtis, etc. Undertaking. Filed March 18th, 1889. S. H. Hays, clerk.

66 In the Supreme Court Idaho Territory.

H. Z. BURKHART, Speaker of the House of Representatives of the 15th Session of the Legislature of Idaho, Plaintiff,

vs.

C. H. REED, Chief Clerk of the House of Representatives of the 15th Session of the Legislature of Idaho, and E. J. Curtis, Secretary of Idaho Ter., Defendants.

Assignment of Error.

And now comes the said plaintiff, by Arthur Brown, his attorney, and assigns error to the decision of the supreme court of the Territory of Idaho in denying the writ of mandamus in said cause as follows:

I.

The court erred in sustaining the demurrer to the alternative writ of mandamus in said cause.

II.

The court erred in holding that it had no power or authority to compel the defendant Reed to correct the pretended journal of the house of representatives so as to show the adjournment of said house by the speaker thereof at the hour of twelve o'clock on the
67 60th day of the session of the Idaho Legislature.

III.

The court erred in holding that it had no authority to compel the defendant Curtis to produce the pretended journal of the house of representatives to compel its correction, stating the adjournment at the proper place, and correct the said journal according to the facts.

IV.

The court erred in not compelling the defendants to correct the pretended journal of the house of representatives so as to show that at the hour of twelve the speaker of the house of representatives did declare that the said house had adjourned without objection or dissent from the house, and that thereafter certain pretended acts of

legislation were had which were without authority and null and void.

V.

The court erred in not requiring the defendants to so correct the journal of the pretended house of representatives as to show, at the proper place in said journal, that the house of representatives was adjourned, and that the pretended acts of legislation signed by George P. Wheeler, as speaker *pro tem.* of the house, were passed after the said adjournment on the 60th day.

VI.

That the court erred in holding that the said alternative writ of mandamus did not state facts sufficient to constitute a cause of action in mandamus.

Wherefore the said plaintiff prays that the said judgment
68 in the supreme court of the Territory of Idaho may be reversed, and the said defendants required to answer to the said alternative writ of mandamus, and for such other relief as may be proper under the circumstances.

ARTHUR BROWN,
Att'y for Plaintiff & Appellant.

69 [Endorsed :] In the supreme courts of Idaho Territory. H. Z. Burkhart, speaker of the house of representatives, etc., plaintiff, *vs.* C. H. Reed, chief clerk of the house of representatives, etc., *et al.*, defendant-. Assignment of errors. Filed March 18th, 1889. S. H. Hays, clerk.

70 SUPREME COURT IDAHO TERRITORY, *ss:*

I, S. H. Hays, clerk of the supreme court of Idaho Territory, in pursuance of the appeal allowed in the case of H. Z. Burkhart, speaker of the house of representatives of the 15th session of the Legislature of Idaho Territory, *vs.* Edward J. Curtis, secretary of Idaho Territory, lately pending in said court, do return attached hereto a transcript of the record of proceedings, opinions, and bond, together with the original citation of proof of service thereon and assignment of error, all in and of said court and cause, to the Supreme Court of the United States; and I hereby certify that the said attached transcript of said record, proceedings, opinions, and bond is a true, full, correct, and complete copy of the several originals on file — of record in my office.

[Supreme Court Seal, Idaho Territory.]

In witness whereof I have hereunto set my hand and affixed the seal of the supreme court of Idaho Territory, at Boise City, this 30th day of March, A. D. 1889.

S. H. HAYS,
Clerk Supreme Court Idaho Ter.

[Endorsed:] Supreme court Idaho Territory. H. Z. Burkhart, speaker, &c., plaintiff, against Charles H. Reed, chief clerk, &-., and Edward J. Curtis, sec. of Idaho, defendant-. Filed ——, 18—. ——, clerk. ——, deputy clerk.

Endorsed on cover: Idaho Territory supreme court. No. 1548. H. Z. Burkhart, speaker of the house of representatives of the 15th session of the Legislature of Idaho Territory, appellant, *vs.* C. H. Reed, chief clerk of the house of representatives, & E. J. Curtis, secretary of the Territory of Idaho. Filed April 12, 1889.

FILED,
NOV 11 1889
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

H. Z. BURKHART, Speaker of the House of Representatives of the Fifteenth Session of the Legislature of Idaho Territory, *Appellant.*

vs.

CHAS. H. REED, Chief Clerk of the House of Representatives, and E. J. Curtis, Secretary of the Territory of Idaho, *Respondents.*

J. P. CLOUGH, President of the Council of the Fifteenth Session of the Legislature of Idaho Territory, *Appellant.*

vs.

E. J. CURTIS, Secretary of Idaho Territory, *Respondent.*

BRIEF OF APPELLANT.

ARTHUR BROWN,
LYTTLETON PRICE,
Counsel for Appellant.

ANGELL & SULLIVAN,
KINGSBURY & McGOWAN,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

H. Z. BURKHART, Speaker of the House of Representatives of the Fifteenth Session of the Legislature of Idaho Territory, *Appellant.*

vs.

CHAS. H. REED, Chief Clerk of the House of Representatives, and E. J. Curtis, Secretary of the Territory of Idaho, *Respondents.*

J. P. CLOUGH, President of the Council of the Fifteenth Session of the Legislature of Idaho Territory, *Appellant.*

vs.

E. J. CURTIS, Secretary of Idaho Territory, *Respondent.*

BRIEF OF APPELLANT.

STATEMENT OF FACTS.

The Act of Congress creating the Territory of Idaho, limits the duration of the sessions of the legislature to sixty days.

Rev. Stat. U. S., Sec. 1852.

It does not provide when the sixty days shall begin or end. That is determined by the act of the Legislature itself, Rev. Stat. of Idaho, Sec. 120: "The Legislature must assemble at the seat of government on the second Monday in December, A. D. 1889, and on the second Monday in December every two years thereafter."

The second Monday in December, 1888, was December 10th. On that day the Legislature assembled, and held one session.

On the 7th day of February, 1889, the 60th day of the session, the Legislature met and was in session, and continued in session until 12 o'clock at night. At that hour the presiding officer of the lower house, the House of Representatives, calling the attention of that body to the proceedings, directed the clerk to read the record of the proceedings of the day; which was done. The same were then approved in proper form, and then the speaker, in pursuance of his duty, rising, declared that the hour of 12 o'clock at night having arrived on the 60th day, to which the said Legislature was limited by the said Act of Congress, declared that the said session was adjourned *sine die*. To this declaration there was no dissent or objection on the part of any member. It apparently was concurred in.

The speaker and other members of the House then withdrew. After they had gone out, it appears that a part of the House of Representatives remain-

ing, pretended to re-organize, and elected what was called a Speaker *pro tem*, and proceeded to legislate, and passed seventeen bills on the face of the record, giving them apparent validity as enactments of law. The Clerk, in making up the record, carefully abstains from recording anything with regard to the adjournment, as declared by the lawful Speaker of the House of Representatives, but adds the passage of the seventeen bills and the approval thereof as if enacted in the regular way, and all bearing date the 7th, though in fact it was done on the 8th.

The contention on the part of the appellant in this case is, that this proceeding and declaration on the part of the Speaker was a legal adjournment, and ended the jurisdiction and power of the House of Representatives. The appellant was the Speaker, and as such applied to the Supreme Court of the Territory of Idaho for a writ of mandamus. The alternative writ was issued, setting up the foregoing facts, to which defendant demurred for seven different grounds, stated in the record and in the demurrer.

Record, pp. 9, 10, 11.

The principal ground upon which the determination of the court below rested was that the courts had no jurisdiction to compel by mandamus a correction or perfection of the journal of the House of Represen-

tatives, because the same was a co-ordinate branch of the Government, and the courts could not interfere with it.

Record, pp. 22–29.

The demurrer was sustained, and the first and principal question in this discussion is, whether the courts can compel a correction of the journal of a branch of the Legislature.

It is also contended on the part of the defendant, and is a question raised by the demurrer, that the court has no jurisdiction over the person of the defendant Curtis, who is the Secretary of State of Idaho Territory, because, it is claimed, that said Secretary of State is an officer of such high consideration—being a United States officer—that a Territorial court cannot command him by the writ.

It is next contended the court itself had no jurisdiction to issue mandamus.

It is also claimed that the mandamus improperly runs to two officers. It is directed to Reed, who was the Clerk of the House of Representatives, to correct the journals; and it is directed to Curtis, who was Secretary of State for the Territory, to bring the journals into court, that Reed might have an opportunity to correct them, Reed having, as it appears by

the alternative writ, claimed to have delivered the journals and records out of his hands into the hands of the Secretary of the Territory.

Other points of practice are raised by the demurrer; but the decision of the court appears to be principally, or solely, upon the ground that the courts cannot mandamus a co-ordinate branch of the Government to correct its records.

ASSIGNMENTS OF ERROR.

And now comes the said plaintiff, by Arthur Brown, his attorney, and assigns error to the decision of the Supreme Court of the Territory of Idaho in denying the writ of mandamus in said cause as follows:

I.

The Court erred in sustaining the demurrer to the alternative writ of mandamus in said cause.

II.

The Court erred in holding that it had no power or authority to compel the defendant Reed to correct the pretended journal of the House of Representatives so as to show the adjournment of said house by the speaker thereof at the hour of 12 o'clock on the 60th day of the session of the Idaho Legislature.

This power and right to examine into the passage of laws cannot be defeated or thwarted by any doings of the Legislature itself. Should the Legislature attempt, by indirection or concealment, or falsehood, to avoid the compliance with any constitutional requirement, the Court will find some way to ascertain the fraud and enforce the consequences. Much more would this right exist as against the acts, doings and frauds or concealments of any ministerial officer and employee of one branch of the Legislature. We have a case here where it is claimed on the part of the appellant that an employee of the Legislature, the Clerk of the House of Representatives, is enabled, by a false report of the proceedings of the last day's session to enact laws of the most vital character, changing and disorganizing the Territory itself. If it be possible for the Clerk of the House of Representatives to thus create laws, then, instead of being a government by the people, the people of the Territory of Idaho are so unfortunate as to be governed by the Clerk of the House of Represntatives.

In such case the session might be extended *ad libitum* by the Clerk. A false entry as to the date made. It needed but the concurrence of himself and the Governor of the Territory, and any person that he might name as the Speaker *pro tem.* to continue to enact bills and pass laws during the entire season; in fact, it might be extended over years, so long as it was

dated back, and all of its proceedings made to bear date of the 7th day of February, 1889. The courts will not permit this sort of subterfuge to succeed; but in proper cases courts of equity always permit parol evidence of the exact facts that took place. No record is so sacred or so solemn, or so formal, or authenticated from such high source, but what a court of equity may go behind that record, and determine the fact, in case a fraud has been enacted or a ministerial officer charged with the duty has forged or altered, or added to, the facts contained in such record

What can be done in the way of correction by a court of equity can also be done in proper cases by mandamus. A court will, by mandamus, correct the most solemn records, and require the ministerial officers charged with them to certify to the truth in making them, and, if improperly made, to correct them.

In Hill vs. Goodwin, 56 N. H., 441, there was an application for mandamus to compel the Clerk of a town meeting to correct the minutes of the town meeting by inserting an adjournment which had been declared by the presiding officer. Much conflict of testimony was had as to whether the adjournment in fact took place. The Clerk claimed that none had taken place, and upon that supposition certain other proceedings were had by the town meeting; while if the adjournment took place, these proceedings would be

null and void. The power of the court to amend such a record was therefore discussed, and cases from that State cited. That town meeting was, within a limited field, a Legislature, as much so as the Legislature of Idaho. After discussing the cases quite fully, the court held that the mandmus should be granted, and compelled the correction of the minutes so as to assert an adjournment.

In Hendee vs. Cleveland, 54 Vt., 142, the record of the Probate Court was ordered corrected by mandamus, the facts upon which the correction were based being shown by parol, and the court being a court of record.

In Wise vs. Bigger, 79 Va., 269, it was held that mandamus will lie at the petition of any citizen of the Commonwealth to compel the keeper of the rolls to strike from the rolls, and the superintendent of public printing to omit from the acts of the assembly any act which, in the judgment of the Supreme Court of Appeals is not a law."

See also—

Smith vs. Moore, 38 Conn. 105.
Farrell vs. King, 41 Conn., 448.
Douglas Co. vs. Read, 5 Or., 373.
State vs. Whittit 61 Wis., 352.
Pom. Eq., 871 (Note).
2 Whar. Ev., 983.
37 Ia., 518.

67 Ill., 234.
Bell vs. Pike, 53 N. H., 3473.
Hall vs. Summersworth, 39 N. H., 511.

In Smith vs. Moore, 38 Conn., application was made to contradict in a mandamus proceeding the records of a justice of the peace by parol evidence. The court held that it was proper to show the actual facts as against the record, and force the officer to make the record conform to the truth, using the following language:

"The claim is that a record, or a certified copy of a record, imports verity, and a review of the question by the superior court would infringe this principle. This claim would apply with equal force to the correction of the records of a town or of a superior court; but the cases cited have determined otherwise. It is true they import verity, and the reason why it is found necessary to correct them when they do not state the truth arises from this fact. Deeds and other instruments in writing import verity, and cannot be attacked collaterally, but still it is every days' business to correct them when they are erroneous."

But to discuss this case as if it were the journal of the Legislature that was sought to be corrected is to assume the very point in controversy. The applicant alleges in this case that the proceedings which it is sought to expunge are proceedings had after the Legislature had adjourned. The doings of that body of men were doings of a body not authorized by law.

It was not the Legislature. We must take the complaint to be true, and as such the adjournment which was made by the Speaker was a final end of the session of the Legislature, and they no longer had any authority or jurisdiction whatsoever.

If hereafter this court or the lower court should determine that that was the rightful Legislature, and that the presiding officer had no power to adjourn the session, then the proceedings would stand, not because the court did not have the power to inquire by mandamus into the truth, but because upon the merits the truth is with the defendant. If, as we assert, there was an adjournment of this Legislature, and the declaration to that effect by the Speaker ended the session, then the court has a right to protect the records against spoliation and addition by the unauthorized acts of him who had been clerk. As it now stands, seventeen enactments are thrust upon the statute book, having all the semblance and appearance of law, which, if the truth had been stated, were never passed by the legislature of Idaho, and were only prepared and concocted after that body had adjourned, by persons who had no jurisdiction or power in the premises whatsoever.

Mandamus is the proper writ to command the performance of a duty by any and every ministerial officer. What difference can it make whether he be appointed by a court or by a legislature? His duty is

the same. He is a ministerial officer. The clerk is as distinctly a ministerial officer as the clerk of a court of record. Upon his refusal to perform his duty, this is the appropriate way to compel him

In Maine the court went so far in ascertaining the validity of the laws of the legislature as to say which one of two bodies was the lawfully elected legislature ; and yet, in doing so, they were compelled to determine, by taking judicial notice, who were rightfully elected. Ordinarily, a greater stretch of the power of a court could not be found, as it is universally conceded in the legislatures of this country, as in Congress itself, that each house must be the judge of the election of its own members. But where there are two houses, each claiming to be the rightful one, it was necessary for the proper determination of the validity of the laws, to say which house was rightfully elected, and the court did it.

Justices' Answer, 70 Me., 308.
Prince vs. Skillin, 71 Me., 361.

In Pennsylvania, the court went so far as to determine who were the proper Common Council with which the select council of Philadelphia must meet, and compelled that clearly legislative body to meet and perform the functions of their office.

Lamb, et al. vs. Lynd, 44 Pa. St., 336.

These cases go much further in determining the rights, duties and limits of the legislature than we ask the court to go here. We simply ask that the record be perfected after the legislature itself has adjourned, in order to protect the legislature itself from forgery and imposition.

The court below, in determining this question, say, Record p. 27:

"From the language of section 124 of the Revised Statutes, it is clearly the duty to make up such records as he deems proper to be delivered, and deliver the same."

Is it meant by this that the clerk may draw upon his imagination, or upon his interest, and add such legislation as he deems proper? If so, it is probable he has the power of making out such records as he deems proper. The duty of the clerk is clearly to record truthfully what transpires, and that only, and omit to add anything that did not transpire.

The court proceed:

"The law presumes he has done this correctly; if not he is amenable to the criminal court of this Territory."

The law may presume that *prima facie*. Undoubtedly it does; but it is a presumption which is open to proof, and may be overcome, and is overcome in this case by the statements in this alternative writ, which is admitted to be true by

the demurrer. The courts say that—

"The papers so delivered over are, or were, the journal of the Legislature. If they are, then this proceeding necessarily fails."

Why so? It is possible, and it is true, according to the statements of this alternative writ, that they are in part the journal, and in part the additions of the clerk. It was the journal, undoubtedly, down to the point where the clerk omitted to record the adjournment of the Speaker, and added the proceedings thereafter. After that, it was his own work and that of unauthorized persons. It is the right of every citizen to have the journal made so as to tell truthfully what then transpired. The court are not asked to make the journal of the Legislature, as the court below intimate, but they are asked to make the clerk make one according to the truth, and not according to the fiction. To say that that power is vested in the Legislature alone is to assume the question. The Legislature had no power to issue mandamus. It is true, had they remained in session, they could have corrected their journal; but they adjourned, and this was the last day, and the last entry, and the record of the adjournment was necessarily to be made up after the adjournment was had. Their power ceased to be effectual, and had passed away.

The court proceed:

"The principle of law is settled beyond controversy that the court will not go behind the journal of the Legislature to ascertain what was done by that body."

That principle is only settled in collateral attacks. There is no case cited, and none can be, that holds that a ministerial officer of the Legislature is exempt from the writ of mandamus, any more than any other ministerial officer. There is no difference in principle between him and other officers.

The court proceed to say the journal itself is conclusive, and if the record is incorrect or improperly made up it is for the Legislature itself to correct, and not for the court. Like any other record, it may be corrected; and as for the Legislature itself correcting it, was it not a species of solemn mockery to tell us that the Legislature that had ceased to exist could correct this record, and the record that ceased to exist by this very entry which we have asked to have entered and made a part of the journal?

The Court say that the journal filed purports to be the journal of the Legislature. Perhaps it does. It is for that reason, at least, that we seek to have it corrected, so as to show what was the journal of the Legislature. It is said to be signed by Geo. P. Wheeler, the Speaker *pro tem.* of the House. Geo. P. Wheeler was made Speaker *pro tem.* of the House after the Leg-

islature ceased to exist, if such an office as Speaker *pro tem.* can be said to exist at all. Whether it is correct upon its face is not the question. The question is here, shall it be corrected according to the truth as it in fact existed beyond and behind the record? Or shall the entry made by the clerk of the Legislature be beyond the power of the Legislature itself, and beyond the power of the courts to correct? The Legislature cannot correct it, because they are not in existence—were not in existence when he completed this record. Are the courts powerless?

II.

The act of Congress limits the sessions to sixty days. These are calendar days, and such has been the practice of this and all other Territorial Legislatures. The first day of the sixty was December 10th, making 22 days in December, 31 in January, and 7 in February. There was one session on the 10th. However few hours it may have continued, it was a session, and that day must be counted as one. The last day was the 7th of February. It was the 60th. With the expiration of that day, the limit prescribed by Congress had been reached. If no objection had been made, and all the officers had continued to treat that day as continuing after 12 o'clock, there are authorities that hold that such continuing would not

invalidate the legislation; but the question here is a very different one. In fact, here the presiding officer did actually and as fully as a presiding officer could, adjourn each of the Houses; and the House of Representatives was adjourned by the concurrence and consent of the members. The presiding officer has the right, and it is his duty, when the time arrives, to adjourn the legislative body, without motion from that body. It is the practice in the House of Representatives of Congress, and in other legislative bodies.

Rules of Prac. H. of Rep., 274.
Journal 49th Cong., 887.
Jefferson's Manual, 183.
Cushing, Sec. 527.

The declaration of adjournment *sine die*—dissolution—was made without objection on the part of the members of either house of the Legislature, as an official dissolution, whether the officer declaring such adjournment had the power to adjourn the Legislature or not, or whether he had the power to dissolve the Legislature or not. This is determined in People vs. Hatch, 33 Ill., 9, where the Governor, assuming that he had the right—that the time had come when he could dissolve the Legislature, did so by proclamation, and members acquiesced, but afterwards some questioned his right to adjourn the Legislature, and re-met and re-enacted laws; and the court held that, there being a pos-

sible contingency in which the Governor could adjourn that body, he having exercised that authority without objection on the part of the members of the Legislature, it was an official dissolution, and the principle is applicable here. The Speaker had the power, was the proper officer to declare the final dissolution and adjournment. He did so, without objection, and by concurrence of the members. The House was dissolved thereby.

The adjournment by the Speaker was an adjournment by the whole House. He is the mouth of the House, and when, with the concurrence of all the members announced the adjournment *sine die*, the whole body adjourned, and was dissolved.

Cushing Law Leg. Assem. Secs. 290, 318.
Hill vs. Goodwin, 56 N. H., 441.

The decision of the presiding officer is the decision of all over whom he presides. It is his duty to announce what they do. It is the duty of the recording officer to record his announcement, and the recording officer cannot himself be the judge of the actions of the body. He must be governed and controlled by the presiding officer.

Bell vs. Pike, 53 N. H., 482.

Such an adjournment being according to the statutes and the law, it was too late for the House, after

12 o'clock, to re-organize. The members had ceased to have any legislative capacity. All legislative functions had passed from them. The adjournment ended the session. Although Burkhart continued as the Speaker for the two years to which he was elected a member.

Cushing Law Leg. Assemblies, Sec. 296.
Rev. Stat. Idaho, Sec. 122.

III.

THE RIGHT OF THE PLAINTIFF TO INSTITUTE PROCEEDING.

The objection is raised in the demurrer of each of the defendants that the plaintiff has no right to institute these proceedings. The duty imposed upon the clerk is to correct and keep the minutes, and upon the secretary to correctly record the proceedings and laws of the Territory, and the right to have that duty performed belongs to each and every citizen of Idaho. It is a universal right to have a public duty performed, and the Speaker of the House and the President of the Council are officers who have a special interest and and right to supervise and correct the records and proceedings of the bodies over which they respectively presided. It was their to duty correct and sign the minutes and proceedings. It was their duty to see that nothing should go upon the minutes, nothing should

form a part of the record, except that which actually took place; and the law required them, as public officers, as members of the Legislature, to be citizens, and each of them had all the right of any other citizen had to file this suit, and in addition they had that right, which might be looked upon as their duty, to see that the minutes were correctly transcribed.

The rule is that in matters of public importance, and concerning the public alike, any citizens may initiate proceedings in mandamus, and be plaintiff or applicant in the suit.

High, Sec. 431-3.
U. S. vs. Hall, 91 U. S., 354, and cases cited.
Same case, 3 Dillon, 521.

In U. S. vs. Hall, this court held that the mandamus was correctly brought by a citizen of the City of Council Bluffs to compel the Union Pacific Railway Co. to fulfill its contract with the United States to build a bridge across the Missouri River. This case meets the objection raised upon the demurrer in this point. The contract was with the United States, on the part of the Union Pacific Railway Co., was one to enforce which the Attorney General would have been a peculiarly proper officer to have brought suit. No doubt he could have done so, but he did not do it, and the court held that any other citizen of the whole United States had the right and power to do so.

IV.

The demurrer raises the question that the court has no jurisdiction in mandamus over Curtis, the secretary, and Reed, chief clerk ; in other words, that we have no suitable or proper parties as defendants.

The secretary defendant is the Secretary of the Territory, whose duty is to the Territory alone. As expressly named in the acts of Congress and in the local legislation, he is a Territorial officer, and subject to the Territorial laws. The argument that because he is appointed by the United States he is therefore a United States officer, is not true. The source of his appointment makes no difference as to the nature and extent of his duties ; his duties are all Territorial. He is appointed as all other Territorial officers necessarily are—the Governor, the judges are alike appointed by the President and Senate of the United States, but still they remain, in fact, Territorial officers. The courts of Idaho, however, have jurisdiction over United States cases, and are not only Territorial courts, but *ex officio* United States courts. Further, in our form of government, the courts must define the scope and duty of every officer, no matter how high the officer or by whom exercised. The President himself, and the Governor himself are exempt from processes of mandamus and other injunctive relief ; but not so with

their appointees—not so with any appointee of theirs, no matter how high he is.

This court has held that mandamus will lie as against the Secretary of State, the Secretary of the Treasury, and each and all other cabinet officers.

U. S. vs. Kendall, 12, Peters, 608.

The authority under which the Supreme Court in that case held that the court of the District of Columbia had jurisdiction were words giving the court general jurisdiction simply:

"That the said court should have cognizance in all cases in law and in equity between parties, both or either of whom shall be resident or found in the District."

Under this simple ground of authority, this court held that the District Court had authority to issue the mandamus. Compare that authority with that given to the Idaho Legislature,—Sec. 1866, Rev. Stat. U. S., also found in the Rev. Stat. U. S., also found in the Rev. Stat. of Idaho, 28,—which delegates to the various Territorial courts jurisdiction "as limited by law."

Any jurisdiction that the Territory of Idaho may see fit to confer upon these courts, within its limits, is jurisdiction "as limited by law," and is authorized by this act of Congress. The statute of Idaho (Rev. Stat. Idaho, 3816) was specially conferred jurisdiction over all cases of mandate. It is a part of the chapter

on the jurisdiction of the Supreme Court, Sec. 3866. "Its original jurisdiction extends to issuance of writs of mandate, review, prohibition, habeas corpus, and all writs necessary to the exercise of its appellate jurisdiction."

We refer to—

U. S. vs. Schurtz, 102 U S. 372.

Here we have the Secretary and the Clerk, both officers having duties to do pertaining to, and solely for, the benefit of the Territory of Idaho. They are residents of that Territory. We find in the jurisdiction of that court all the right of this case. Their acts are subject to the review of that court. What possible court could possibly take jurisdiction over them for mis-conduct, but the District Court or Supreme Court of the Territory.

This is a question involving the method of proving the laws of the Territory of Idaho. What court was so competent, or so fit to have jurisdiction on that question, as the Supreme Court of the Territory. Here is a question which ultimately, and within the scope of the law, involves the acts of the Legislature of the Territory of Idaho. The question of determining their validity is left to no other court but that of the Supreme Court of the Territory, and to this court on appeal, where it can only arise by way of appeal.

V.

The duty required of the clerk, Reed, is a plain one. It will hardly need citation to show that it is a manifest duty of this officer to keep correctly the minutes of the proceedings, and all the proceedings of the Legislature, and nothing but the proceedings of the the Legislature, and to file such correct record with the secretary.

That he has made incorrect minutes, and has omitted the correct proceedings, and filed such false record with the secretary, is admitted by the demurrer; and it is not answered by saying that he has made a filing, and, therefore, cannot be required to file the correct proceedings. Performance can only be a defence against mandamus when that performance has been according to the duty, and has been completed in pursuance of law. Defective or insufficient performance, or performance in part, or performance short of his whole duty, is not performance at all; and, in theory of law, he has not yet filed the correct minutes of the House of Representatives. He still has them in his possession, because he has failed to file a true account of the proceedings.

We cite as illustrations of this matter the following cases:

In State vs. Whittit, 61 Wis., *supra*, a justice of the peace was compelled to correct his docket, which

had been made up and signed by him. Mandamus issued. He was compelled to add just what we want added here—an adjournment.

In Hales vs. County Commissioners, 2 Gray, 371, 375, the County Commissioners, who had there declared a certain candidate elected, and that he held a certain office within that jurisdiction, were compelled to re-assemble and re-count their votes, which had already passed out of their hands, and certify the office to another.

In New Orleans & Texas R. R. Co. vs. Miss., 112 U. S., 17, the duty was upon the R. R. Co., to build a draw bridge. The railroad company had already built one bridge, which it claimed conformed with its contract with the State; but this court, finding that the bridge did not comform to the contract, conpelled the railroad to build the bridge over again, to tear down that which had already been built and to build and make such a draw bridge as the court defined to be required by the contract as described in the writ.

People vs. Schiellein, 95 N. Y., 124.

This principle is illusted in the re-instatement of bills improperly dismissed. This court in *ex parte* Burk, 120 U. S., 137, by its mandamus, compelled the Supreme Court of Washington Territory to reinstate a bill, which the Supreme Court of that Territory had improperly dismissed.

See also:

Ex parte Bush, 7 Peters, 74.
Harrington vs. Heller, 111 U. S. 796.
U. S. vs. Garnes, 3 Wal., 766.

These cases establish the principle that the courts will order a writ of mandamus wherever there remains a duty not performed, or improperly and incorrectly performed, if the applicant has no other remedy.

The duty of the Secretary of the Territory is to record the laws and proceedings. The ultimate result arrived at is a correct record that he must keep. He is not limited in his manner of procuring information. The clerk may be an authority as to what transpired in the House; but if the clerk should absent himself and not make any record, or hide or conceal himself, and not make any returns, still the legislation is not any the less complete, and the right of the Territory to have its proceedings and laws correctly transcribed is just the same.

The duty of the Secretary still continues. He must procure the best evidence of what transpired. He is not limited to the clerk.

There is no statute of Congress or of the Territory requiring him to accept the minutes of the clerk as final. He must keep a correct record. The rules and practice of the Council require that the record and proceedings be signed by the presiding officer and the clerk. The certificate of the one has just as much potency and effect as that of the other. The record made by the Speaker is entitled

to the same credence as that of the clerk. It was the duty of the secretary to keep and preserve correct records. He has declined to do that duty, and has certified that he will only keep the false one made by Clerk Reed, and not the true one. He thus evaded, and not performed, his duty.

In Hall vs. Fairbanks, 108 U. S, 547, the County Clerk was the officer appointed to spread the taxes, but he could only spread the taxes on the certificate of the board of auditors. The board of auditors audited it and he spread it on the records. But the clerk was spirited away, on the underground, so that he could not certify. The county clerk then said he had no authority to spread the taxes, because the usual evidence was lacking. The Supreme Court directed him that it was his duty to take any evidence which appeared sure to his mind, that the county owed the debt, and that the judgment itself was just as good evidence as the certificate of the clerk or the board of auditors, and he could not avoid his duty by quibbling as to the method by which he was informed of it.

The Secretary of the Territory avoided his duty to correctly record these minutes, by quibbling as to what was certified to him by the clerk. It is not only his duty to take the best means of determining what took place when it was offered to him; but his attention was called to the fact that the proceedings and records were incorrect, to seek the chief clerk, to demand of him that the minutes be corrected, instead of pretending to preserve a false and fictitious record.

The duty we ask both of these parties now is—and

each can be required by mandamus to perform it:

First—That the Secretary to produce this record for correction, so that the original record, and not some other, may be amended.

Second—That the clerk be required to correct the record so as to tell the whole truth of what transpired, all that transpired, and omit what did not transpire from the minutes of the journal.

These are public duties, and the applicant has a right to ask them without any previous demand. No previous demand is required to compel a public officer to perform a public duty.

High on Extr. Rem., sec. 13 and 41.

The duties of the clerk of the House of Representatives are not specifically defined by statute. The statute speaks of them as a thing existing. Their duties seem to be prescribed by their name. Among their duties we find (Rev. Stat. of Id., Sec. 124): "The clerk, at the close of the Legislature must mark, label and arrange all bills and papers belonging to the archives of their respective houses, and deliver them, together with all the books of both houses to the Secretary of the Territory, who must certify to the reception of the same.

The duty of the Secretary of the Territory is defined by the Act of Congress—Rev. Stat. U. S., Sec. 1844:

"The Secretary shall record and preserve all the laws and proceedings of the Legislative Assembly, and all the acts and proceedings of the Governor in the executive department. He shall transmit one copy of the laws and journals of the

Legislative Assembly, within thirty days after the end of each session, to the President and two copies of the laws, within a like time, to the President and Senate, and to the Speaker of the House of Representatives, for the use of Congress. He shall transmit one copy of the executive proceedings and official correspondence, semi-annually on the 1st day of January and July of each year, to the President. He shall prepare the acts passed by the Legislative Assembly for publication, and furnish a copy thereof to the public printer of the Territory, within ten days after the passage of each act.

VI.

The secretary and clerk are rightly joined. Each has a duty to perform, tending to produce the one common result, viz: the correct record. The plaintiff has a right to that result, and a right to join all persons in this proceeding of mandamus whose joint or several action is necessary to contribute to or accomplish the end.

Labell vs. Moulton, 112 U. S, 213, 223 and cases cited.

Farnsworth vs Boston, 121 Mass., 173.

Foreman vs. Commissioners, 21 O State, 311.

State vs. Whittit, 61 Wis., 352.

People vs. Schiellein, 95 N. Y. 133.

The command in mandamus may command the Secretary in advance. He here has threatened to treat and certify his false account, a false record of the proceedings as a true one. His duty in the future may by compelled.

Atty. Gen. vs. Boston, 123 Mass., 472.

VII.

It is claimed in the demurrer that the writ is too indefinite. The alternative writ in each case commands a definite duty, and one known to each defendant. The command of the writ requires him to make up his record correctly according to certain facts, which are stated in the complaint and admitted true by the demurrer, viz: to record an adjournment in the order in which it was announced by the Speaker. The Secretary is commanded to produce the minntes for correction, and receive the true record after such correction, and to treat it thereafter as the true record.

If any part of these commands is too broad or indefinite, the court may so modify or specify the command that he can understand it.

People vs. Delaware Co., 45 N. Y., 204, 207.
People vs. Nostrand, 46 N. Y., 377, 380.
Hamilton vs. Pittsburg, 34 Penn., 514.
Wait's Prac., 596.

VIII.

In the case of Clough, President of the Council, etc., vs. Curtis, Secretary, etc., the same principles are involved as in the case of Burkhart vs. the Clerk, and both cases are submitted together.

The facts in the Clough case are slightly different, and

the relief sought is a little more far-reaching in its consequences.

The facts are, in that case, that the final adjournment, *sine die*, was announced as a dissolution of the Council sometime after 12 o'clock at night, of the 60th day. That also was without objection on the part of the body over which that officer presided. He remained to see that this entry was made on the journals—the entry of this adjournment. After he had retired and part of the Council with him, certain persons claiming to be the Council re-assembled. The next day, when the proceedings of the Council are filed, with the Secretary of the Territory, it is found that the entry of this adjournment—the dissolution—is cut out, the leaves being cut off and cut out of the journal, and the subsequent proceedings are added as if no adjournment had taken place. The seventeen bills, which also passed the lower house being passed into enactments by the Council.

Plaintiff has directed the mandamus to the Secretary of State alone, having called his attention to these cut leaves and the mutilated condition of the journals, shown to him and furnished to him, in a statement of what transpired. He demanded of him that he expunge from the records these subsequent proceedings, and enter the adjournment.

His duty, as defined in the statute already quoted, is to correctly record and preserve the laws and proceedings of the Legislature. He cannot perform that duty by recording and preserving what he knows is false and bogus, and enter-

tering as law the proceedings of a mob organized after the Legislature itself had adjourned.

The principles upon which this case rests are the same as those of Burkhart vs. Reed, and we submit it upon the same grounds and for the same reasons.

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Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 1133.

JOHN P. CLOUGH, President of the Council of the Fifteenth Session of the Legislature of Idaho Territory, *Appellant*,

vs.

E. J. CURTIS, Secretary of Idaho Territory, *Respondent*.

BRIEF OF APPELLANT.

ARTHUR BROWN,
Attorney for Appellant.

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BRIEF OF APPELLANT.

STATEMENT OF FACTS.

The facts in this case are very similar to those in the case of Burkhart vs. Reed, and reference is made to the brief in that case. But as there are some peculiarities to this case, perhaps it is desirable that a separate brief should be filed in it.

The case here is an appeal from the decision of the Supreme Court of Idaho Territory, sustaining the demurrer to the alternative writ of mandamus.

The alternative writ states the facts, to-wit:

> That on the night of the sixtieth day of the session of the Legislature, after the hour of 12 o'clock had arrived and passed, the applicant for the writ, who was the presiding officer of the Council of said Legislature, announced, after calling the attention of the body over which he presided to what he was about to do, "that because the hour of 12 o'clock and after had arrived, and the time had elapsed in which the said Legislature was permitted to transact business, therefore, the said Legislature was adjourned without date."

That then the President directed the Secretary to record the time of that adjournment, and that he remained until he saw that the Secretary had written it upon the minutes which he was keeping, and which he called the record. That then the Council dispersed. That afterwards a part of the members of that which had been the Council, then ex-members, re-assembled, elected another person President of the Council, *pro tem.*, and proceeded to pass seventeen bills into enactments of law. That afterwards, in making up this record, the clerk, or some other person, cut out that part of the record which contained the adjournment, leaving the stubs of the leaves where it was cut out; and that the pretended record, as afterward made up by the Secretary, shows no adjournment, no dispersion, but that the Council had continued right along, and

the president, having absented himself, another man was elected President *pro tem.* The record as made up also fails to show that these proceedings and the passage of these seventeen pretended acts was after 12 o'clock at night, and after the adjournment by the President.

The writ also states that the applicant has applied to the Secretary of State, who was the custodian of laws, stated to him the facts, and furnished him a written statement of what did transpire, and asked him to strike from the record these seventeen bogus and pretended laws, and to correct the minutes according to the fact and the truth; and that he refused to do it. Wherefore, the applicant prayed that the said seventeen bogus and pretended enactments be stricken from the records of the laws of Idaho, and that the proceedings as recorded be recorded according to the truth, showing the adjournment at 12 o'clock, and that the said seventeen laws were passed thereafter.

To the facts stated in this alternative writ of mandamus, the defendant demurred, and the demurrer was sustained by the Supreme Court of Idaho, on the ground, principally, that the court had no jurisdiction to inquire into the truthfulness of what pretended to be the adjournment of the Legislature of Idaho, which was a co-ordinate branch of the government. If on its face it was a *prima facie* record, courts were powerless to say that it was a forgery, or was not such.

Other grounds were stated in the demurrer. The same objections were taken to this proceeding as in the case of Burkhart vs. Reed, and the discussion there will preclude a re-discussion here.

SPECIFICATION OF ERROR.

Under this state of facts, where the record shows formal assignments of error, we specify the error of which we complain. That the court erred in sustaining this demurrer, and in holding that the courts did not have jurisdiction by mandamus to compel the Secretary of State to truthfully record the proceedings of the Legislature, and to strike from its records any pretended enactment that was in truth not an enactment by the Legislature of Idaho and within the jurisdiction of that body.

BRIEF AND ARGUMENT.

This appeal is taken under that statute which authorizes an appeal from the Supreme Court of any Territory in "any case in which is drawn in question an authority exercised under the United States."

U. S. Stat. at Large, Mar. 31, 1885.

The Legislature of Idaho are authorized to pass laws and to legislate for that Territory, and for the people within that area. by virtue of a delegated authority given them in the Organic Act by Congress. It is an authority exercised under the authority of the United States. Whether the persons that assembled after 12 o'clock at night and passed these seventeen pretended enactments were, or were not, authorized by the United States to pass laws, is the question to be determined, and thus is drawn in question the authority exercised under the United States.

We deny that that body of men were authorized to pass laws, but insist that the United States only authorized the whole Legislature, and within the 60 days and before an adjournment, and before 12 o'clock at night. The respondent contends that that body of men was the Legislature, and was authorized by the Unsted States to pass laws; so that no question can arise in this case as to the jurisdiction of this court.

Passing to the main question involved, as to the power of the court to compel the correction of what purports to be the record of the Legislature of Idaho, I wish to call attention to a few authorities not cited in the case of Burkhart vs. Reed.

Before anything can be called a record, either of the Legislature or of any court, somebody must be authorized to make that record. Records cannot be made by private persons. A record is an act of some authorized body having jurisdiction to make the same. Everything is not a record because it is called such. It

can only be a record when by facts outside of it itself some branch of the Government has jurisdiction to act in the premises. Even in collateral proceedings the jurisdiction may always be assailed. The record of the legislature certainly cannot stand on any higher plane than the record of the highest courts in the land, or the records of a sister State; and yet the great weight of authority from this authority has established that such records may be attacked for want of jurisdiction, even in a collaterlal inquiry; and of course, if in a collateral inquiry, it can in a direct one.

The authorities on this subject are not new or novel, but have frequently been before this court. I will call your attention to a few of the leading ones.

In Thompson V. Whitman, 18 Wal. 468, Judge Bradley states the law:—

"But facts once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the court had no jurisdiction, it is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so questioned. The very object of the evidence is to invalidate the *pa*per as a record. If that can be done, no statements contained therein have any force; and if any such statements can be used to prevent inquiry, a slight form of words may be adopted so as to effectually nullify the right of such inquiry."

In Knowles vs. Gas Light & Coke Co., 19 Wal. 58, it was held that the facts stated in the records of a court of general jurisdiction could be disproved by parol testimony. If the facts that give a court jurisdiction can be contradicted by parol, why not the facts

stated by the clerk of the Legislature? The clerk of the Legislature is in no way superior to the clerk of the court.

Gardner vs. Collector, 6 Wal. 499.

This court also held in an early case that the jurisdiction of record was not to be assumed because it stated it.

Elliot vs. Piersol, 1 Peters 340.

See also

Galpin vs. Page, 18 Wal. 351.
Clark vs. Hales, 1 Doug., 390.
Sears vs. Terry 26 Conn. 373.

But in New York perhaps the fullest and fairest expression has been had of the law on this subject. I particularly refer to and make a part of my brief the argument of Ferguson vs. Crawford, 70 N. Y. 254, where Judge Rapallo reviews the cases at length, and states the law fully and clearly. Any discussion of this matter always refers back to the case of Starbuck vs. Murray, 5 Wend. 154. The language of Judge Marcy has become trite but classical, and in this case it is apt, and therefore I quote it as applicable to a record of the Legislature as to the record of a court.

"But it is strenously contended that if other matter may be pleaded by the defendant, he is estopped from asserting anything against the allegation contained in the record, it imports perfect verity, it is said, and the parties cannot be heard to impeach it. It appears to me that this proposition assumes that

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Supreme Court of the United States.

OCTOBER TERM, 1888.

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No. 1133.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

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Supreme Court of the United States

OCTOBER TERM, 1888.

J. P. CLOUGH, PRESIDENT OF THE COUNCIL OF THE FIFTEENTH SESSION OF THE LEGISLATURE OF IDAHO TERRITORY,

Appellant,

vs.

E. J. CURTIS, SECRETARY OF IDAHO TERRITORY.

No. 1133.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

Brief for Appellee.

The questions that arise in this case are generally the same that are presented and discussed in the case of *Burkhart Speaker* vs. *Reed & Curtis*, No. 1134, to which we refer the court.

To sustain this appeal the appellant relies on the second section of the act of third of March, 1885, 23d U. S. Stats. 443.

The act is a restraining and not an enlarging statute.

Its first section forbids writs of error and appeals from the supreme courts of the Territories to this court, unless the matter in dispute exceeds in value five thousand dollars.

The second section is as follows:

> "That the preceding section shall not apply to any case * * * in which is drawn in question the validity of a treaty, or statute, or of an authority exercised under the United States." * * *

The writ in this case was issued originally by the Supreme Court. It is a Territorial court of limited jurisdiction. It is not a United States Court.

Cheston vs. *Engelbrecht*, 13 Wall., 434;
U. S. vs. *Mays*, 1 Idaho, 763.

Its powers are defined and limited by statute. Section 1866, R. S.

Its powers as to cases which draw "in question the validity of a treaty or statute or an authority exercised under the United States" are only appellate.

In all such cases there is no original jurisdiction granted to it by any law of the United States. But such power is by express statute vested in the district courts. (Sec. 1910, R. S.)

The Supreme Court of Idaho had, therefore, no original jurisdiction in this case, and this court has no appellate except to dismiss.

A court, when any case arises in which a statute is set up as a material element in the action, *may inquire collaterally* into the existence of such statute.

But I find no well considered precedent for doing so directly by proceeding to declare a law void.

The case of *Wise* vs. *Biggar*, 79 Va., 269, cited by appellant's counsel, so far as this question is concerned, is not well considered, and is mere dictum, as the mandamus was refused on other grounds.

Neither does any known instance occur, where a court directly assumed to add anything to, or subtract anything from, the journal or record of a supreme legislative body. If the court can order the entry of an adjournment, it can also order an entry of the opening of a session, of a motion made at such session, of a call of the yeas and nays, of the passage of a bill, in fact it can order the making of a whole journal.

This does not come within the range of judicial powers.

If the court had such powers it would hardly exercise them by commanding a political officer, whose only duties were to receive, receipt for, and safely keep the journals and send copies thereof to the President. If it did so it would scarcely use a mandamus which never confers a power, but only orders the use of a preexisting one when that use becomes a duty. A mandamus is not a process for the investigation of disputed questions of law and fact. It should only be used to compel the discharge of duties plainly imposed by law.

G. A. JENKS,
Of Counsel.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

H. Z. BURKHART, SPEAKER, ETC.,
Appellant,
vs.
CHAS. H. REED, CHIEF CLERK ETC., &
E. J. CURTIS, SECRETARY, ETC.,
Appellees.

J. P. CLOUGH, PRESIDENT, ETC.,
Appellant,
vs.
E. J. CURTIS, SECRETARY, ETC.,
Appellee.

MOTION TO ADVANCE CAUSE.

ARTHUR BROWN,
LYTTLETON PRICE,
Attorneys for Appellant.

ANGEL & SULLIVAN,
KINGSBURY & McGOWAN,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

H. Z. BURKHART, Speaker of the House of Representatives of the Fifteenth Session of the Legislature of Idaho Territory, *Appellant*,

vs.

CHAS. H. REED, Chief Clerk of the House of Representatives, and E. J. CURTIS, Secretary of the Territory of Idaho, *Respondents.*

MOTION TO ADVANCE CAUSE.

And now comes the said appellant and moves the advancement of this cause on appeal from Supreme Court of Idaho.

This is a proceeding by mandamus, to perfect and correct the record of the proceedings of the last day of the 15th session of the Legislature of Idaho. The Legislature, having adjourned, no longer has power to correct and perfect its own record, and this application is made by the Speaker of the House to compel the Clerk of the House and Secretary of State to correctly record what transpired on the night of the last session and the adjournment of the 60th day.

At 12 o'clock, midnight, February 7th, A. D. 1889, on the 60th day, the Speaker of the House declared the Legislature adjourned, without objection and with the concurrence of the House.

The Speaker and a part of the members then left the room. Afterwards, other members re-assembled, re-organized, elected a speaker *pro tem.*, and assumed and pretended to legislate, passing seventeen bills, and calling them enactments.

In making up the journal, the clerk omitted all mention of the adjournment as made and declared by the Speaker.

Without that record, it is impossible to raise the question of the validity of these seventeen pretended enactments of the Legislature.

To establish that record, as the Legislature had ceased to exist, there was but one way. That was to resort to the courts, and that by application of mandamus in the name of the Speaker.

It is claimed by the defense, by way of demurrer that the courts have no power to mandamus officers of the Legislature, to correct the record of the proceedings of the Legislature, for the reason that the Legislature is a co-ordinate branch of the Government. This is one of the questions arising upon the case.

It is also claimed that the Supreme Court of Idaho Territory, where these proceedings originated, had no power to mandamus the Secretary of State of that Territory, because he is a United States officer.

It is also claimed that the court itself had no authority to issue mandamus. These and other points of practice also arise as questions in this case.

The principal objection upon which the court below passed is raised under that part of the demurrer that alleges that the alternative writ does not state facts sufficient to constitute a cause of action in mandamus, and raises the question of the power of the court to compel the clerk and Secretary of State to correct these records.

The Secretary of State is appointed at the pleasure of the President, for the term of four years. The Clerk of the House of Representatives is an officer existing only under the laws of the Territory of Idaho, his duties are limited to the session for which he is elected, and his term of office would expire with the term of the Legislature for which he acted. That term is defined by the Laws of Idaho: "Rev. Stat. Sec. 116.—The term of office of the Legislature is two years, to the first day of December next after

their election." The Legislature, whose proceedings we are inquiring into, was elected in 1888, and the clerk and all the officers thereof, and the term of office of the Speaker, who is the relator in this case, also expires on the first day of December, 1890.

Among the bills assumed to be passed into enactments and law by this body of men which came together after the regular adjournment, is one re-dividing a part of the Territory into counties, distributing the largest county into four parts. The organization of these into new counties, and the disorganization of the old one is creating great confusion in the affairs of that Territory, and raising questions of conflict of jurisdiction requiring immediate settlement.

If these cases cannot be heard at this term of court, it will be of no avail to have them heard after the new counties have been completely organized, and two or three years have elapsed.

This is an appeal in a case "in which is drawn in question the validity of an authority exercised under the United States."

Sec. 1909, Rev. Stat., as amended Mar. 3, 1885.

The body of men who assembled after the period of adjournment were attempting to exercise an authority under the United States—attempting to legislate for the Territory of Idaho. The validity of that legislation can only be questioned by this proceeding, and should be determined by the courts. Delay will render our appeal ineffectual.

Now appellant moves the advancement of said cause under that part of the 26th rule, which provides that "No other case shall be taken up out of the order on the docket, or set down for a particular day, *except under particular and peculiar circumstances to be shown to the Court.*"

We claim that we are within that rule for the following reasons:

1. The matters involved are public interests, seriously affecting a large portion of the citizens, residents and property-owners of the Territory of Idaho.

2. It involves the legality of the re-organization of a large portion of that Territory, to-wit: The re-organization of that part known as Alturas County.

3. The quieting of the jurisdiction of that Territory, requires that this cause should be heard at the earliest possible moment. Owing to the conflict in jurisdiction over the territory involved, much of the revenue for Territorial and county purposes cannot be collected. Public debts are being constantly created in the territory under the conflicting jurisdiction of validity. Important interests of the whole people of Idaho are directly involved in this proceeding.

4. The said appellant would be deprived of all benefit from his appeal, unless said cause can be heard now, during this term.

"S. S. *ex rel.* McLeod vs. John Sherman, Sec., etc., Phillips' Prac., p. 291.

Some of the reasons for this advancement do not appear on the face of the record, to-wit: The number of bills claimed to be law passed by the bogus legislature. The appellant has caused them to be added to this motion, by way of affidavit, and reference thereto is hereby made as a part of this motion.

ARTHUR BROWN,
LYTTLETON PRICE,
Attorneys for Appellant.

ANGEL & SULLIVAN,
S. B. KINGSBURY,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

H. Z. BURKHART, Speaker of the House of Representatives of the Fifteenth Session of the Legislature of Idaho Territory, *Appellant*,

vs.

CHAS. H. REED, Chief Clerk of the House of Representatives, and E. J. CURTIS, Secretary of the Territory of Idaho, *Respondents*.

AFFIDAVIT OF H. Z. BURKHART.

TERRITORY OF IDAHO,
County of Alturas. } ss.

H. Z. Burkhart, being sworn, says: I am the applicant in the above named cause for the writ of Mandamus and am familiar with the said cause.

That the said suit is brought to correct the journals of the house of representatives, of which I was the presiding officer.

If the said journals should be corrected as prayed in the said application for Writ of Mandamus and in the Alternative Writ, the journals of the fifteenth session of the Legislature would show, that after the final adjournment of said Legislature, and after the power of the said Legislature to do business under the Act of Congress had ceased, that certain persons, purporting and

pretending to be the Legislature of Idaho, passed fifteen pretended or alleged acts of the Legislature; which said fifteen pretended acts are entitled as follows:

1. An Act to Apportion the Members of the Legislature. Approved February 7, 1889.

2. C. J. R. 9. To pay for the publication of the Governor's Election Proclamation. Approved February 7, 1889.

3. An Act to amend Section 1298 of the R. S. Approved February 7th, 1889.

4. An act Relating to the Trespassing of Hogs. Approved February 7, 1889.

5. An Act allowing the State of Oregon to erect a Hatchery in Idaho. Approved February 7, 1889.

6. Council Substitute for H. B. Nos. 7–18, and C. B. 5, relating to the violation of Game and Fish Laws. Approved February 7, 1889.

7. An Act relating to Tax Deeds. Approved February 7, 1889.

8. Substitute for H B. 46, 48, 81, and 83, relating to the division of Alturas County. Approved February 7, 1889.

9. An Act to invest the money in the General School Fund of Idaho Territory. Approved February 7, 1889.

10. An Act for the Relief of John Early and others. Approved February 7, 1889

11. An Act to suppress and prevent the dissemination of contagious diseases among domestic animals. Approved February 7, 1889.

12. An Act to prevent the sale of cigarettes to minors and other purposes. Approved February 7, 1889.

13. H. J. R. 7, Relating to pay of Stenographer of House Committee. Approved February 7, 1889.

14. An Act providing for the re-location of the County seat of Washington County. Approved February 7, 1889.

15. H. J. M. 3, Praying for the enlargement of the National Park.

That the pretended Act described in said list as "Substitute for H. B. 46, 48, 81 and 83, relating to the division of Alturas County, approved February 7, 1889," or pretending to be ap-

proved at that time, was one of the said acts which was passed after the final adjournment of said house, and after the period of sixty days, in which said Legislature could exist, had elapsed.

That said Act of the Legislature, this applicant claims to be void; that it purports to divide the largest county in Idaho Territory into four different parcels and to create two new counties; that the Governor had appointed officers for the said two pretended counties, called, to-wit: Logan and Elmore Counties. That, in pursuance thereof the said county officers have proceeded to act. That the county officers of Alturas County, out of which said counties were carved, claim jurisdiction over the territory occupied by the said pretended counties of Logan and Elmore. That the claim, on the one side, of the existence of two counties, and the denial on the other, of their right and jurisdiction, has produced a conflict of jurisdiction, which demands to be immediately settled by the court.

That unless this cause can be advanced, so as to be heard at once, and the questions determined, great confusion will arise in the jurisdiction of the said counties, and of the said Territory.

That as your applicant is advised and believes true, the question involved as to the validity of the said acts can only be determined by this Honorable Court, as they have already been determined and acted upon in the Supreme Court of the Territory of Idaho; and, if the hearing of this cause should be delayed until it could be taken up in its regular order, great confusion, injustice and injury would be done to the people of Idaho Territory.

H. Z. BURKHART.

Subscribed and sworn to before me, this 20th day of September, 1889.

[SEAL.]

S. H. HAYS, Clerk, District Court,
By J. A. HAYS, Deputy.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

J. P. CLOUGH, President of the Council of the Fifteenth Session of the Legislature of Idaho Territory,
Appellant.

vs.

E. J. CURTIS, Secretary of Idaho Territory.
Respondent.

MOTION FOR ADVANCEMENT OF CAUSE.

And now comes the said appellant, by his attorneys, and moves the Court for the advancement of this cause.

This proceeding is very similar to the case of Burkhart vs. Reed, and to that we refer. In this case the Relator, J. P. Clough was President of the Council, and he applied to the Supreme Court of the Territo.y of Idaho for mandamus to compel E. J. Curtis, Secretary of the Territory to expunge from the record certain pretended proceedings assumed to have been had after the final adjournment on the 60th day.

The facts upon which that application for mandamus was based were, that after 12 o'clock, midnight, on the 60th day of the session of Council of Idaho Legislature, the President

of the Council announced that the hour had arrived and the time elapsed in which the Legislature had authority to transact business under the laws of Congress, and therefore declared the Council adjournd without day. He then required the chief clerk of the Council, Edward L. Curtis, to record in the minutes the said adjournment. The said record was thereupon written out, as a part of the minutes of that days' proceedings.

After this adjournment, by the President of the Council, a part of the members of the Council met together again, and pretended to re-organgize, and elected a new presiding officer whom they called President *pro tem.*, and proceeded to transact business in the way of legislation, seventeen bills being passed as enactments of the Legislature.

The next day, when the journal or minutes of the proceedings were made up, the part of it containing this adjournment was cut out, and, in addition to the minutes as they had actually taken place, the clerk had added the proceedings showing the passage of the seventeen bills, thus apparently giving the seventeen bills validity by the record of their passage if said record should stand as the record of the Council.

The attention of the Secretary of State was called at once to the mutilated condition of the minutes. The President of the Council presented him with a true statement of the facts, and demanded that the adjournment as proclaimed and announced by the President should be entered in its appropriate place and that the proceedings pretended to be had thereafter, be expunged, which was refused by Mr. Curtis, Secretary of State.

Thereupon the President appliod for mandamus, to which the defendant demurred.

The demurrer was sustained by the Supreme Court of Idaho Territory, and the plaintiff appealed to this court.

The reasons why the appellant asks for an advancement of said cause are set out in the case of Burkhart vs. Reed, hereto annexed, and made a part hereof. The questions involved are the same. The same reasons apply with equal force to the proceedings in the Council and to this case. It was another branch of the same legislature, the validity of whose acts is sought to be reached by the proceeding in these two cases.

We, therefore, refer to the former motion in the other case, hereto annexed, and to all the reasons therein stated.

ARTHUR BROWN,
LYTTLETON PRICE,
Attorneys for Appellant.

ANGEL & SULLIVAN,
KINGSBURY & McGOWLAN,
Of Counsel.

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CLERK.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1889.

H. Z. BURKHART, SPEAKER OF THE HOUSE OF REPRESENTATIVES OF THE FIFTEENTH SESSION OF THE LEGISLATURE OF IDAHO TERRITORY,
Appellant,

vs.

C. H. REED, CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES, AND E. J. CURTIS, SECRETARY OF THE TERRITORY OF IDAHO.

No. 1134.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

BRIEF FOR APPELLEES.

G. A. JENKS,
Of Counsel for Appellees.

R. O. Polkinhorn, Printer, 632 and 634 D Street.

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IN THE

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OCTOBER TERM, 1889.

H. Z. BURKHART, SPEAKER OF THE HOUSE OF REPRESENTATIVES OF THE FIFTEENTH SESSION OF THE LEGISLATURE OF IDAHO TERRITORY,
Appellant,

vs.

C. H. REED, CHIEF CLERK OF THE HOUSE OF REPRESENTATIVES, AND E. J. CURTIS, SECRETARY OF THE TERRITORY OF IDAHO.

No. 1134.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF IDAHO.

BRIEF FOR APPELLEES.

Statement of the Case.

On the 8th day of February, 1889, an alternative writ of mandamus, at the instance of the appellant, was issued by the Supreme Court of Idaho Territory,

commanding Charles H. Reed, one of the appellees, "to submit the minutes of the proceedings of the last day of the fifteenth session of the House of Representatives of Idaho Territory to the plaintiff for his inspection and signature as the Speaker of the said House of Representatives, and that immediately thereafter you do file the same with the Secretary of Idaho." (Rec., p. 2.)

On the 12th of February, 1889, Charles H. Reed filed his answer, that he had not in his possession the minutes which he was commanded to produce, but that, before the issuing of the writ, or any notice thereof, he had on the 8th day of February, 1889, delivered the minutes to the Secretary of the Territory as required by law, and that he had neither possession nor control of them. (Rec., p. 3.)

On the 12th of February, 1889, the attorney for the plaintiff filed an affidavit that it was "necessary and indispensable that Edward J. Curtis, Secretary of the Territory of Idaho, be made a party defendant herein, as would more fully appear by the answer of C. H. Reed. * * * it appearing * * * that the said Edward J. Curtis, as such Secretary, is the custodian of the minutes."

On motion made in pursuance of the affidavit, the amendment was allowed. On the 14th of February an alternative writ of mandamus was issued against Reed, the Clerk of the House, and Curtis the Secretary of the Territory of Idaho, alleging that, "after the hour of 12 o'clock, midnight, of the 7th day of February, 1889, being the sixtieth and last day of said session, the plaintiff as said speaker, acting as such, announced that the time is now arrived when by the law of Congress this session must close, by

limitation of time, *and declared the House adjourned sine die; and that to said announcement of the arrival of the time of adjournment there was no dissent* by said House of Representatives, or any member thereof; * * * that after said speaker had so adjourned said House of Representatives on said day and hour, the said Speaker, and a portion of the members of the said House of Representatives, left the assembly room, and thereafter several members of said legislature elected a pretended speaker thereof, and pretended to pass acts and perform the duties of the House of Representatives."

The writ commanded them "to bring such minutes and pretended minutes and journal of the said House of Representatives into court, so the same may be corrected so as to state the facts, and that said Charles H. Reed correct the same, in accordance with the facts, so that it may appear in the proper place in said minutes that said Speaker asked the Clerk if there was any further business before the House, and that the Clerk said there was not, and that, thereupon, the minutes were read and approved, and that thereafter, it being 12 o'clock midnight, the said speaker announced to the House that the time having arrived when the session must close according to law of Congress, he therefore now declared the House adjourned *sine die*, and that to the said announcement of the expiration of the term of the session there was no *dissent*, and that to said order of final adjournment there was no objection, and that in every way, manner and particular, said Clerk, Charles H. Reed, make said minutes correspond with the facts, and be a true, full, and complete record of said last day's session of the said

House of Representatives, and be nothing otherwise; and that after being so corrected said H. Z. Burkhardt may have an opportunity to sign said minutes as corrected; that the same be returned to the defendant, Edward J. Curtis, as such Secretary." (Rec., p. 7.)

Defendants, on the 18th day of February, 1889, severally demurred to the writ, on the grounds of

Want of jurisdiction of the court over the defendants and over the subject-matter;

Want of capacity of plaintiff to sue;

Misjoinder of parties;

Misjoinder of causes of action;

Defect of causes of action;

Ambiguity and uncertainty of allegations and remedy against the several parties. (Rec., pp. 8, 9 and 10.)

On the same day they severally moved to quash the writ, on substantially the same grounds set forth in their demurrers. (Rec., pp. 10, 11, and 12.)

On the 11th of March, 1889, the demurrers were sustained, from which appeal was taken to this Court (Rec., p. 22.)

Brief of Argument.

I.

THE ALTERNATIVE WRIT.

The alternative writ is the foundation of all further proceedings.

(High Ex. Rem., secs. 537, 538.)

The writ alleges the appellant is the Speaker of the House of Representatives; Charles H. Reed is its chief clerk; that he has in his possession the minutes of the House.

On the 7th of February, 1889, the minutes of that day were approved. After the approval, and after midnight of the 7th, the Speaker "announced that the time is now arrived when by the law of Congress of the United States this session must close by limitation of time," and declared the House adjourned *sine die*, and that to said announcement of the arrival of the time of adjournment there was no dissent by said House of Representatives, or any member thereof, and that said speaker of the House of Representatives did then, so acting as such Speaker, actually adjourn such House."

After the alleged adjournment the Speaker and a portion of the members left the assembly room. The other members remained in the room, elected a Speaker *pro tem.*, and proceeded with business.

That it was the duty of the chief clerk to keep true minutes, and that he had not kept such minutes in that he had not entered thereon the alleged adjournment of the House, but that he had falsified the journal by entering therein: "That pending the reading the Journal, the said Speaker left the chair, and went out of said House."

That he "neglected and refused" to allow said Speaker to inspect or revise and approve or sign the said minutes, but the minutes were signed by George J. Wheeler, who had been elected by the members who had remained after the Speaker had left, as Speaker *pro tem.*

That he filed the minutes as thus made up with Edward J. Curtis, as Secretary of the Territory.

That on the 7th of February demand was made that Curtis should not record the alleged proceedings after the adjournment, but he threatened to record and preserve the same as a record of the proceedings.

The writ commands the defendants jointly to bring the minutes into court. It commands Reed to correct them to conform to the allegation of the writ, and when thus corrected, to return them to Curtis, as Secretary. (Rec., pp. 5, 6 and 7).

That the minutes are in the possession of Reed, and that he had delivered them to Curtis, the Secretary, appears to be an irreconcilable contradiction. The latter, probably, is true, as section 1844, R. S. U. S., makes the Secretary the custodian of the minutes.

II.

THE JOURNAL.

The part of the Journal which it is proposed to have Chief Clerk Reed change is duly certified and published in the Journal of the 15th session of the House of Representatives of Idaho, pp. 235 to 246, and is herewith printed in Appendix B.

The existence and terms of a public law are not issuable. The courts take judicial notice of the passage, approval and date of legislative acts, and in deciding any dispute as to the existence of a law, take notice of all relevent material facts, including the Journals or records of legislative bodies. They may resort to any proper evidence to determine

whether a law exists, resorting first to that which is most appropriate.

Gardner vs. *Collector*, 6 Wall., 499;
Watkins vs. *Holman*, 16 Peters, 25;
1st Phillips on Evidence, p. 425, and note;
People vs *Commissioners*, 54 N. Y., 276, 279;
People vs. *Devlin*, 33 N. Y., 279, 280, 281;
Fletcher vs. *Peck*, 3 Cranch, 87, 131;
Sherman vs *Story*, 30 Cal., 253.

When a Journal is required by the constitution or statute to be kept, and certain action of the legislative body to be entered therein, the Journal as to such action or non-action imports absolute verity, and is the exclusive evidence thereof.

Ryan vs. *Lynch*, 68 Illinois, 160;
Spangler vs. *Jacoby*, 14 Illinois, 297;
Division of Howard County, 15 Kansas, 211, 214;
South Ottawa vs *Perkins*, 94 U. S., 260, 277.

But where there is no constitutional or statutory requirement that a Journal shall be kept, or what shall be entered therein, the failure to make an entry in the Journal of any action is at most but *prima facia* evidence that no such action was had; or if entries be made of action that was not had, such entries are neither conclusive nor exclusive evidence to the courts as to the existence of a public law. The result of a full investigation of this subject is thus stated in *Gardner* vs. *Barney, collector*, 6 Wall., 511 :

"We are of opinion, therefore, on principle as well as authority, that whenever a question

> arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule."

The general doctrine thus stated is well supported and illustrated by precedents cited in the opinion, and has been repeatedly recognized by this court with approval.

> See *South Ottawa* vs. *Perkins*, 94 U. S., 260 and 277;
> *Post* vs. *Supervisors*, 105 U. S., 667.

There is no allegation in the writ that any of the laws enacted after the alleged adjournment were private, but if such private laws had been enacted, only the parties interested therein could invoke judicial action concerning them.

I find but two references to a journal in the Organic Act of the Territory. Section 1842, R. S. U. S., requires that when an act is passed over the veto of the Governor by a two-third vote, the action of the legislative assembly, with the votes thereon by yeas and nays, shall be entered in the Journal of each house.

Section 1844 provides:

> "The Secretary [of the Territory] * * * shall transmit one copy of the laws and Journals of the legislative assembly within thirty days after the end of each session thereof to the President, &c. * * *

I find no reference to the keeping of Journals, or what shall be entered therein, in the Territorial statutes.

As the courts without an issue or formal proof take judicial notice of all that is contained in the Journals, but at the same time take judicial notice of all other material facts which may supply, explain, or contradict them, as to public laws, there seems to be no necessity to invoke any court, in anticipation of that which will be a matter of its own cognizance, when a case may arise, to command that certain entries shall be made, or certain entries shall be erased from the Journal.

The passage of the law by the representatives of the judges and the people is notice to all, whether any Journals are kept or not. The validity of the law is in no way dependent upon whether Journals are kept, or whether they truthfully set forth what was actually done or not. The Judges have a right to resort to any source of information which is capable of conveying to the judicial mind a clear and satisfactory answer to the question; Does the law exist? In this case the mandamus seems to be intended to take the place of a bill to perpetuate testimony, which when perpetuated and exhibited in another court, might have very little, if any, weight in the mind of the court in determining whether a given law did or did not exist. The plaintiff does not set out in the writ any sufficient cause for the amendment of the Journal. But if he had, and the Clerk and Secretary had been favorably disposed to the action, they might have admitted all the allegations, although the House and its members would deny them. If a mandamus had been thus granted with-

out notice to the real parties, and the Journal amended in pursuance thereof to conform to the wishes of the plaintiff, such Journal thus made up might not carry conviction nor be satisfactory to the judicial mind. If, after such an amendment, it should be made to appear, as in this case, the facts seem to be, that two-thirds of the House, seven-twelfths of the Council, and the Governor, with their Journals and records apparently regular, prove the contrary, and it should appear the mandamus was allowed on false or mistaken suggestion; under such circumstances a court taking judicial notice, would, in all probability, entirely disregard such amendments so caused to be entered. I respectfully submit that, if there is any wrong in this case, mandamus is not the proper remedy.

III.

THE REMEDY.

The remedy invoked is a mandamus. A mandamus is just what its name signifies. It is an absolute, unconditional and clearly definded affirmative command. Implicit and unquestioned obedience is compelled by the writ.

(High Ex. Rem., Secs. 547, 558, and 565).

The respondent has no alternative, but must fully and strictly obey it. Even an injunction from another court forbidding the action commanded will not excuse obedience (*Id.*, Sec. 567).

> "The duty sought to be coerced must be of so plain and unmistakable a nature as to leave no room for doubt" (*Id.*, Sec. 423).

"The relief is refused, except in a plain case." (*Id.*, Sec. 414).

"A mandamus does not *confer power upon those to whom it is directed.* It only enforces the exercise of power already existing, when its exercise is a duty."

U. S. vs. *Clark*, 95 U. S., 773;
Supervisors vs. *U. S.*, 18 Wall., 77;
U. S. vs. *Macon County*, 99 U. S., 591;
Ex Parte Rowland, 104 U. S., 612.

The writ will not issue where the officer has not power to perform the particular thing commanded.

High Ex. Rem., Sec. 32;
Secretary vs. *Garahan*, 9 Wall., 298, 313;
U. S. vs. *Boutwell*, 17 Wall., 604.

"A mandamus will not be granted where it would not be an effectual remedy, or where a full and adequate remedy exists through a different proceeding."

Com. vs. *Supervisors*, 29 Penn. State., 121.

It will not be granted to undo an act already done.

Ex Parte Burtis, 103 U. S., 238;
Maxwell vs. *Burton*, 2 Utah, 599;
Short on Information, p. 250;
People vs. *Reardon*, 3 N. Y., *Nisi Prius*, 560, 563.

Want of legal remedy does not give the right.

High on Ex. Rem., Sec. 19, and note.

"So the writ will be refused where its purpose is to compel a court to alter its record, so as to correspond with the state of facts disclosed by affidavits filed with and made a part of the application for mandamus, * * * * and in all

such cases the writ is refused regardless of whether the inferior tribunal has decided properly or improperly in the first instance."

High Ex. Rem., Sec. 154, and note.

The writ will not be allowed in cases involving distinctly questions of law and fact, nor wherein the action invoked involves judgment and discretion.

U. S. vs. *Commissioner*, 5 Wall., 563, 566;
Board of Police vs. *Grant*, 47 Am. Dec., 104.

IV.

THE PARTIES.

a. *The plaintiff.*

The writ is issued at the instance of H. Z. Burkhart, Speaker of the House of Representatives. He has no beneficial interest, as distinguished from the general public.

The original jurisdiction of the Supreme Court of the Territory, by which the writ in this case was issued, is derived only from the statutes of Idaho.

Section 3815, R. S. Idaho (Appendix A), divides the jurisdiction of that court into original and appellate.

Section 3816 (Appendix A) grants to the Supreme Court original jurisdiction of writs of mandate.

Section 4977 provides for and limits the cases in which it may issue.

Section 4978 (Appendix A) provides:

"It must be issued upon affidavit on application of party beneficially interested."

This positive provision of the statue is in accordance with the doctrine applicable to this remedy in many States.

See *People* vs. *Olds*, 3 California, 137;
People vs. *Thompson*, 25 Barber, 73;
People vs. *Supervisors*, 12 Barber, 27;
High on Ex. Rem., Sec. 33.

The jurisdiction, then, being granted and limited by the statutes of the Territory, the doctrine laid down in the case of *U. P. R. R.* vs. *Hall*, 91 U. S., 354, does not apply.

The plaintiff is not a competent party to bring the suit originally in the Supreme Court. In cases in which the one beneficially interested is in the public, the proceeding in that court must be instituted by the Territory through its proper prosecuting officer.

b. *The defendants.*

The rule of pleadings established by the Idaho Statute, section 4169 (Appendix A) is:

> "The causes of action so united must all belong to only one of these classes, and must affect all the parties to the action."

When not modified by statute, "the general principles and rules of pleading may be said to prevail in cases of mandamus, as far as applicable to the subject matter, and in the absence of statutory regulations to the contrary, the practitioner must still resort to, and be governed by, the rules established by common law."

High Ex. Rem., sec. 448.

The defendants are Charles H. Reed, the Chief Clerk of the House of Representatives, and E. J. Curtis, the Secretary of the Territory, each in his official capacity. The Chief Clerk is an officer of the House of Representatives. The Secretary is an officer appointed by the President for the Territory. The duties of the Chief Clerk are defined by section 124 of the statutes of Idaho, (Appendix A.) At the close of the session, his last act is to deliver the papers, archives and journals to the Secretary.

The duties of the Secretary are defined by sections 1843 and 1844, R. S. U. S. His first duty is to receive the papers from the Chief Clerk, and certify to the receipt thereof, and after that within thirty days to forward them to the President, the Senate and the House. The duty of the one does not begin until that of the other shall have ended. They have no joint duties. Neither is responsible for the act or default of the other. The Secretary cannot sit in judgment on the act of the Clerk, and decide what may be wrong or erroneous. Neither can the Clerk after the delivery of the journals take them from the Secretary, nor restrain the Secretary's action as directed by law.

The commands of the alternative writ are absolutely several. Curtis is commanded to bring the journals into court. Reed after that is commanded to correct them and return them to Curtis. (Rec., p. 7.)

It is therefore contended that there is a misjoinder of the parties defendant and also of causes of action.

A misjoinder is fatal.

4 Field's Lawyers' Briefs, sec. 566;
People vs. *Commonwealth*; 5 Abbotts' Practice Repts., 241.

V.

THE JURISDICTION

A.

The Supreme Court of Idaho had no original jurisdiction, and if it had no appeal to this court is authorized from the judgment of the Supreme Court of Idaho in this case. Section 1866, R. S. U. S. limits the jurisdiction of the Territoral Courts to powers granted by law.

Section 1909, R. S. U. S., provides:

> "Writs of error and appeals from the final decisions of the Supreme Court of the Territory of * * * Idaho * * * shall be allowed to the Supreme Court of the United States in the same manner and under the same regulations as from thecircuit courts of the United States, where the valueof the property, or the amount in controversy * * * exceeds one thousand dollars, except that a writ of error or appeal shall be allowed to the Supreme Court of the United States from the decisions of the Supreme Courts created by this title, or any judge thereof, on writs of habeas corpus, involving the question of personal freedom."

This is not enlarged but is further limited by the act of the 3rd of March, 1885. 23 U. S. Statutes, 443.

This section, fairly interpreted, only includes such cases as are cognizable in the circuit courts of the United States—cases which are such as come within the jurisdiction of the Federal courts.

The Supreme Court of Idaho has appellate jurisdiction of both Federal and Territorial cases, but it has no original Federal jurisdiction.

Section 1910 R. S. U. S. confers original jurisdiction in Federal cases only on the District Courts of the Territories. It provides:

> "Each of the District Courts in the Territories * * * shall have and exercise the same jurisdiction in all cases arising under the Constitutionand laws of the United States, as is vested in the Circuit and District Courts of the United States, * * * *but writs of error and appeals in all such cases may be had to the Supreme Court of each Territory, as in other cases.*"

See Curtis Jurisdiction of U. S. Courts 92; *Riggs* vs. *Johnstan* 6 Wall., 566.

If this case is a Federal case, then the Supreme Court of Idaho had not original jurisdiction, and as a consequence this court has not appellate jurisdiction, except to dismiss the cause.

All original jurisdiction of the Supreme Court of the Territory is granted by section 3816 R. S. of Idaho, which provides:

> "Its original jurisdiction extends to the issuance or writs of mandate, review, prohibition, habeas corpus, and all writs necessary to the exercise of its appellate jurisdiction."

This origina! power is not granted by the organic act. It is derived solely from the Territorial grant, and is limited to Territorial cases, in which Federal questions are not involved.

The exceptional grant of appeal to this court in *habeas corpus* cases under section 1909, just cited, implies a denial of appeal in all other Territorial cases. Therefore, whether this be a Federal or a Territorial case, no appellate jurisdiction is vested in this court.

B.

Appeal does not lie to review discretionary action of a lower court.

The granting or refusal of a mandamus is discretionary.

U. P. R. R. Co. vs. *Hall*, 91 U. S., 354;
Ball vs. *Lappius*, 3 Oregon, 56;
State vs. *Gracy*, 11 Neb., 233.

C.

The Supreme Court of Idaho had no original jurisdiction as to the Secretary.

His custody of these records is prescribed by United States laws, as well as substantially all his other principal duties.

R. S. U. S., 1844.

He is appointed by the President.

R. S. U. S., 1843.

He is paid, except for certain minor duties which are paid by fees from the parties in interest, by the United States.

R. S. U. S., *Sec.* 1845.

Section 1910 R. S. expressly vests the jurisdiction in cases arising under the laws of the United States in the District Courts, as United States courts. His duty, which he is alleged to have disregarded, is expressly prescribed by section 1844 R. S.

It is ruled in the case of *McClurry* vs. *Silliman*, 6 Wheat., 598, and approved in the case of *Nebraska* vs. *Lockwood*, 3 Wall., 239, that

"A State court cannot issue a mandamus to an officer of the United States. His conduct can only be controlled by the power that created him."

D.

The Supreme Court of Idaho had no jurisdiction to amend or purge the journal of the House of Representatives.

The powers of the Government in the American system are divided into three general divisions, the Legislative, the Executive, and the Judicial. Within the range of the powers belonging to each division, the department to which those powers are entrusted is supreme. The Legislature cannot lawfully exercise judicial power, nor can the judiciary rightfully exercise legislative power. In its own sphere each possesses exclusive jurisdiction. The Legislature of a Territory possesses all the legislative powers conferred by its Organic Act. As an incident to the law-making power, it possesses the exclusive right of providing rules for its own government, and making and keeping its own records. All the officers who are employed by it for these purposes are its agents, to do a part of its incidental legislative duties. Such officers are subject to its command, and amenable to it alone for a faithful discharge of their duties. Law-making includes the making and prescribing or publishing of rules of action. That publishing or making known is a part of legislative power. If a journal be kept as a means of publishing and perpetuating the existance of the law, that journal is kept as an incident of the legislative power. Unless otherwise expressly established by law, the legislature

may or may not keep a journal, and if a journal be kept, it may enter therein all or only a part of its proceedings. If the journal be well and truthfully kept, it is well; if it be negligently and falsely kept, it is not within the province of the Judiciary to criticise or sit in judgment upon its accuracy or errors. If the keeping of the journal is an incident to legislative power, the courts cannot exercise it, for they possess no legislative power. If it be within the judicial power, the legislature cannot exercise it, for it possesses no judicial power. It is certainly within the power of the legislature to keep or correct its journals. It is therefore not within the power of the judiciary to keep, amend, or correct them.

> "The only correction that can be made in a legislative journal is by the body that caused it to be made."
>
> *State* vs. *Smith*, 44 Ohio, 348;
> *State* vs. *Moffitt*, 5 Ohio, 363, 364;
> *Koehler* vs. *Hill*, 60 Iowa, 545;
> *In re Robert*, 5 Colo., 525, 528;
> *Cooley's Const. Lim.*, page 163, Note 27, 5 ed.;
> *Territory* vs. *Clayton*, 18 Pac. Rep., 628, 629.

If the journal delivered by the Clerk to the Secretary is the journal of the House, no court has power to change or correct it.

The writ admits the journal has been delivered to the Secretary by the Clerk;

That the book so delivered was the journal of the House;

That it was kept, and the entries made therein by the Clerk, as Clerk, in the hall of the House;

It is signed by one of the members as *pro tem.* speaker, an officer recognized by law (Stats. of Idaho, section 123—Appendix A);

The Speaker *pro tem.* was elected by members of the House. (Rec., p. 6);

That election was had by members of the House, who either were, or had been, in session immediately before;

The election was had before the minutes of that day's session had been signed;

If there was any adjournment before the election, it was not entered on the journal;

The adjournment was not made by the House, nor is its assent alleged;

After the election of the Speaker *pro tem.*, the House "pretended to pass acts, and perform the duties of said House of Representatives;"

All these proceedings were entered in the journal, and signed by George P. Wheeler, the Speaker *pro tem.*

It substantially alleges the journal is full, except the alleged adjournment, and correct upon its face, and that all that appears there was directed and done by the members of the House, and was recorded by the Chief Clerk of the House in the journal of the House, and promulgated as such under the sanction of their official oaths.

The officers who did this are presumed to be competent to discharge their legislative duty, and are conclusively presumed to have acted in good faith as to their motives.

The courts have no more power to direct the Clerk of the House to add to or strike from a journal of a

supreme legislative body, thus regular, than a legislature would have the right to direct the clerk of a supreme court to strike from or add to the records of the court. In either event the sole power to correct is in that department of the Government by which the record is made. Any such interference would give rise to such a clashing of jurisdictions as might lead to the overthrow of the distinction between the legislative and judicial powers, and destroy the balance of the powers of Government, which is fundamental in the American system.

See *Territory* vs. *Clayton*, 18 Pac. Rep., 628, 629.

The allegation of the plaintiff's counsel that the correction asked for is not the journal of the House, but is only the sole unauthorized act of the Clerk, of his own motion, is self-destructive; for if it be not the journal of the House, it is needless to issue a mandamus, for such an entry would be void. A mandamus would certainly not be granted to command a forger to undo his act.

But the prayer asks that something may be added to the journal. Till this should be added, the residue of what is asked for could not be justified. The result is that the prayer and purpose of the bill is to correct the actual journal of the House of Representatives, by first adding something thereto, in order to justify striking something else from it. Such action the legislature can cause to be taken, but the courts cannot.

VI.

THE WRIT STATES NO CAUSE OF ACTION.

a. A mandamus will not be issued when there is an adequate remedy by other appropriate lawful proceeding.

High on *Ex. Rem.*, Secs. 15, 16, and 17, and Note 1.

The appropriate, regular and exclusive proceeding to correct a journal of a supreme legislative body is by the action of the body itself. It is within "the power of the same legislature, at the same or a subsequent session, to correct its own journal by amendments, which show the true facts as they actually occurred."

Turley vs. *Logan Co.*, 17 Illinois, 151;
South Ottawa vs. *Perkins*, 94 U. S., 264.

"The only correction that can be made in a legislative journal is by the body that caused it to be made."

State v. *Smith*, 44 Ohio, 348;
State v. *Moffitt*, 5 Ohio, 363, 364;
Koehler v. *Hill*, 60 Iowa, 545.

"The journal is made up under the direction of the House, and is presumed to contain a full and complete history of its proceedings."

Spangler v. *Jacoby*, 14 Illinois, 297;
Cushing's Law of Legislative Assemblies, secs. 608, 611;
Ex parte McCarthy, 29 Cal., 403, 405;
Flint v. *Woodhull*, 25 Mich., 108, 109.

The journal may be corrected the same day it was made, by order of the house; if after the day, it must be investigated by a committee, and corrected on their report by the house.

Cushing's Law of Legislative Assemblies, sec. 329, do. 495.

The legislature by which this journal was made is still in existence. Its members were elected at the general fall elections for a term of two years, beginning the first day of December, 1888. Stats. of Idano, secs. 116, and 117—Appendix A.)

"The Governor has power to call an extra session on extrordinary occasions at any time, subject to the approval of the President."

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If there be any sufficient reason to believe a grave wrong exists, which the correction of the journal will remedy, this would clearly be a legal and adequate one.

b. The only reason why the alleged erroneous omissions and entries in the journal are of any degree of importance, as shown by the writ, is that after the alleged adjournment certain laws are shown by it to have been passed by the House, which were also passed by the Council, and approved by the Governor, who thereby recognized the regularity of the action of the House. These laws were delivered along with the journal to the Secretary of the Territory. The Secretary is required by section 1844, R. S.

> "To transmit one copy of the laws and journals of the legislative assembly, within thirty days after the end of each session thereof, to the President, and two copies, within like time, to the President of the Senate and to the Speaker of the House of Representatives, for the use of Congress."

He is also required to publish them. The time within which this is commanded to be done has long since expired. The legal presumption of fact arises that all this has been done. The fact actually corresponds with the presumption of which the courts will take judicial notice. This being done, if the journals and the laws in the hands of the proper officers of the United States, and distributed to all the different officers of the Territory from the proper officer of the Territory show the existence of the laws, and the regularity of their enactment, it would be a very puerile semblance of a remedy to have the Clerk, after the legislature had adjourned, write up the journals differently. If the laws were not enacted legally, or if there is a substantial question as to their legality or propriety, an appropriate legal remedy as to all possible future effect could be applied by a repeal or disapproval of such laws, or alleged laws, by Congress, a remedy which, as to several other Territories, is expressly reserved by mere disapproval. (Section 1850, R. S.)

c. The existence or non-existence of the laws which were passed after the alleged adjournment is the sole necessity for the correction of the journal.

If any rights are claimed under statutes passed after the alleged adjournment, the defendant in any

action founded thereon has a full remedy by demurring to the complaint. The court will take judicial notice of all facts thot bear upon the existence of the statute, and decide whether such a law exists. If the decision is adverse to the existence of the law, the full effect sought in these proceedings is attained.

Dwarris on Stats., 467 ;
1 Kent's Com., 400 ;
Sedg. Stat. and Const. Law, 34 ;
4 Coke's Insts. 26; 8 *ib.* 28;
Gardner v. *Barney, Collector*, 6 Wall. 499, 511;
Sherman v. *Story*, 30 California, 253.

d. On the 7th day of February, 1889, the legislative period of sixty days' duration had not expired. The Speaker had no power to adjourn the House, and his announcement that the House was adjourned *sine die* was void.

Section 1852, R. S. U. S., as amended, provides:

> "The sessions of the legislative assemblies of the several Territories of the United States shall be limited to sixty days' duration."

This enactment is susceptible of two different interpretations: 1st, that all the sessions, whether many or few, of the legislative assemblies, must be held within a continuous period of sixty days; 2d, that sixty days of sessions or actual sittings of the legislative assembly may be held. The act is, that the "*sessions*" of the legislative assemblies of each Territory shall have a duration of sixty days. The word "sessions" applies to the legislative assembly

of each Territory severally, and not to all collectively. The plural of "session," then, implies that each assembly may have more than one session; that the assembly may adjourn. There is no limitation of the power of adjournment. Such adjournment may be for a day, a week, or a month, as the exigencies of the case may demand. If the assemblies should meet at the time fixed by law, and from adequate necessity should adjourn for sixty days or more, it could not reasonably be maintained that the sixty days of "session" provided for by the act would thereby be exhausted, nor that it could not meet again. If the adjournment was for a week or a day the difference of time would involve no difference of principle.

It is therefore respectfully submitted that the act of Congress limited the sixty days to actual sessions —not sixty days of aggregate duration, not to sixty consecutive calendar days, to be computed from the day of meeting, regardless of any adjournments that may have been had.

When the several meetings of Congress are spoken of as a whole continuous period from the first meeting to the *sine die* adjournment, the word "session" is used in the singular, as "the first session of the 50th Congress." The "session" thus spoken of embraces the several daily sessions of both the Senate and the House.

The phrase "legislative assembly" in the act embraces both branches of the legislature, as described in section 1846 R. S. It is therefore strictly analogous to the word "Congress."

The writ does not allege the House had actual sessions which in the aggregate equalled sixty days.

It shows that the Speaker, of his own volition, without any motion or authority from the House, on the 7th day of February, 1889, declared the session closed, and adjourned without day.

Section 120 of the Statutes of Idaho (Appendix A) provides:

> "The legislature must assemble at the seat of Government on the second Monday of December, eighteen hundred and eighty-eight, and on the second Monday of December every two years thereafter."

This being a part of the public law of Idaho, the court will take judicial notice of it. The second Monday of December, 1888, was the 10th of that month. It is not alleged in the petition or in the writ that there was no adjournment of the legislative assembly, nor that the House sat every consecutive day until the 7th of February, 1889. There is no presumption of the existence of such a fact. The general custom of legislative bodies is that they adjourn over Sundays and holidays.

Section 10, R. S., Idaho (Appendix A) declares Sundays, the 1st of January, and the 25th of December, holidays. The presumption is that these days would be recognized by the legislative assembly, and that there would be no sessions of the houses thereon. Between the 10th of December, 1888, and the 7th of February, 1889, eight Sundays and two additional holidays would occur—in all ten days. If the view be adopted that the duration of time was sixty days, excluding adjournments for holidays alone, the session of the legislative assembly would not have expired by eleven days. The

undisputed Journal of the House, of which the courts will take judicial notice (pages 41 and 46, Appendix B), shows that the legislative assembly adjourned from the 20th day of December, 1888, until the 2d day of January, 1889.

If the view be adopted that the duration of sixty days included holidays, and embraced every day over which an adjournment was taken by the House, still it is maintained that the period of limitation fixed by Congress had not expired on the 7th of February, 1889.

The legislative assemblies met on the 10th day of December, 1888. If the first day be excluded in the computation of time, there would be twenty-one days in December, thirty-one in January, and seven in February, including the last, making the aggregate time fifty-nine days.

Section 11 of the Revised Statutes of Idaho provides:

> "The time in which any act provided by law is to be done is computed by excluding the first day, and including the last, unless the last day is a holiday, and then it is also excluded."

In the case of *Cromelian* vs. *Brink*, 29 Penna. State, 524, the Supreme Court of Pennsylvania, after an exhaustive consideration of the authorities as referred to therein, declares the rule as to computation of time to be "that the first day is to be excluded, and the last included."

> "Generally, in computing time, one day is included, and one excluded" (2 Bouvier's Law Dict'y, 731).

In support of this proposition very numerous precedents and authorities are cited. See also *Dutcher* vs. *Wright*, 94 U. S., 561, in which the first day is excluded.

The limitation, therefore, fixed by law had not expired at the time the Speaker alleges he adjourned the House.

To adjourn is an action of the House by which its daily or final session is closed. The Speaker has no power to close any session of the House, except upon the expiration of the term fixed by law, or the close of a session fixed by previous action of the House.

Rules and Practice of the House of Representatives of the United States, 1st Session, 50th Congress, page 274;

Cushing's Law of Legislative Assemblies, section[redacted], 1396, note 2.

The Speaker is but the agent of the House, clothed with certain powers, authorized to perform such duties as are prescribed by law, or by the rules of the House. No authority of law nor rule empowered the Speaker in this case to adjourn the House.

The alleged adjournment was his own wrongful act, without authority, and as such could not lawfully be entered on the journal. When he assumed, without lawful authority, to declare an adjournment, vacated the chair, and left the room, it was the right of the House, and in conformity with parliamentary usage, that the House should elect a Speaker *pro tem.* and proceed with business until the House, by its own act, should adjourn.

Rules of Practice of H. R. U. S., pages 238, 484, 485, 120 and 121.

It is not alleged in the writ that the House assented—it is stated the House did not dissent to the announcement when the Speaker announced that the time had expired. It is alleged in another connection the House acquiesced. It requires the affirmative action of the House to adjourn *sine die* before the expiration of the time fixed by law. That the House in this case did not assent to the unauthorized adjournment of the Speaker is shown by the fact set out in the writ that the members repudiated his act immediately by electing a Speaker *pro tem.* and proceeding with business, as set forth in the writ. (Rec., p. 6.) To conclude that, because there was no dissent to the announcement that the time had expired, that there was assent, is an inference, and not fact, especially when the announcement was not true. Facts must be pleaded, and not inferences. To acquiesce is to be "satisfied, or apparently satisfied." To be apparently satisfied is not necessarily assent. Still less when shown there was an immediate repudiation.

The alleged adjournment set up by the appellant was not an adjournment of the House; but an unlawful attempt by the Speaker to adjourn the House against its will, and as such should not have been entered on the Journal.

e. The clerk had no power after the adjournment of the House to change the Journal.

The Journal is the record of the proceedings of the House. It is made up by the clerk as the agent of the House, in its presence, subject to its approval. After the House has adjourned *sine die* his power over the Journal, so far as making further entries

therein, is ended. Neither has he power to strike out entries made. The mode of correcting journals is set forth in sections 329 and 424 of Cushing's Law of Legislative Assemblies.

The clerk derives no power from a writ of mandamus. If he could exercise the power after the granting of the writ, he could have done so before. A mandamus does not confer power on those to whom it is directed.

> High on Ex. Rem., sec. 32;
> *United States* vs. *County of Clark*, 95 U. S., 773;
> *Supervisors* vs. *United States*, 18 Wall., 77;
> *United States* vs. *Mason Co.*, 99 U. S., 591.

If this court should declare, the clerk after the adjournment, could rightfully and lawfully, at his convenience or at the instigation of some interested party, change the Journal by adding thereto, or striking therefrom, what he honestly or interestedly might think right, expedient, or profitable, if there were no other remedy than this, all the possible evils might be legalized and entailed which are so forcibly depicted in the appellant's brief, page 8.

> "The clerk of the House is enabled, by a false report of the proceedings of the last day's session, to enact laws of the most vital character, changing and disorganizing the Territory itself. If it be possible for the clerk of the House of Representatives to thus create laws, then, instead of being a government by the people, the people of the Territory of Idado are so unfortunate as to be governed by the clerk of the House of Representatives."

We claim the clerk has no such power. A mandamus will not issue where the defendant has not rightful power to do the act commanded.

High on Ex. Rem., Secs. 7 and 14.

f. If the clerk had the power to change the journal after the final adjournment, it would require the exercise of judgment to determine what changes should be made. He would have to pass upon the questions whether the time had arrived when the session should terminate; whether the Speaker had the power to adjourn the House, without any action on the part of the House; whether, if the Speaker so attempted to adjourn it before he had power, the mere non-dissent of the House was effectual to render the act of the Speaker a final dissolution of the session; whether when two-thirds of the House repudiated the action of the Speaker, remained in the hall and forthwith proceeded to elect a Speaker *pro tem*, and continued to exercise legislative functions, with a concurrent recognition of the governor and the council, in accordance with the opinion of the Attorney General of the Territory, rendered upon facts submitted to him by the House, he might not rightfully conclude the adjournment by the Speaker did not close the session; and whether it was not judicious to enter upon the journal the action that was had after the alleged adjournment, in order that there might be *prima facie* written evidence of the whole transaction. These, with many other cognate questions, would have to be passed upon judicially. If he possessed this judicial power, and made an erroneous decision thereon, mandamus would not lie to compel him to undo what he had done. The correct solution of

these inquires involved questions of both law, fact and discretion, and in such cases mandamus will not lie.

U. S. vs. *Edmunds, Com.*, 5 Wall., 563, 566;
Board of Police vs. *Grant*, 47 Am. Dec., 104.

g. The command of the writ as to the Clerk is conditional and anticipatory. This is certainly not a clear case of neglect or refusal to perform a legal duty on the part of the Clerk. The record shows he had parted with the custody of the journal by delivery to the Secretary before any allegation was made that the journal should be amended. (Answer of Reed, Rec., p. 3.) ~~See *Rose vs. Riggs, Clerk*, 76 Va., 939~~. The command of the writ as to him is necessarily conditioned that *if the Secretary will* bring the journals into court, the clerk will correct them.

The command must be unconditional, and it must be absolute. If it should appear when the journals are brought into court that it will be the duty of the Clerk to amend them it is not to be anticipated he will refuse to do his duty. A mandamus should not issue as to him until the record is put into his power, and until he should be guilty of some dereliction. It is not presumed in advance he will not do everything the law requires al his hands.

High on Ex. Rem., Sec. 12.

h. It is discretionary with the court whether the writ shall be granted or refused. *U. P. R. R. Co.* vs. *Hall*, 91 U. S., 343. The court will take judicial notic in the exercise of this discretion of all tne facts in determining the existence of the laws enacted after the alleged adjournment. The facts shown by

the writ are that the journal does not show an adjournment. The Speaker left the chair without the affirmative action of the House on the subject of adjournment. Some of the members remained, and repudiated the action of the Speaker by which he declared the House adjourned *sine die*. Laws were pretended to be passed by the House. This is substantially equivalent to the allegation that the Governor and Council, who were presumed to know whether the session had terminated or not, recognized that the House was still in session. Section 5950 of the Statutes of Idaho, paragraphs 3 and 5 (Appendix A) declare the court will take judicial notice of acts of the Governor and the legislature, and the signature and seals of the several officers.

The journal (Appendix B) shows that, immediately before the alleged action of the Speaker a call of the House was had, showing twenty-two members present; that pending the reading of the journal the Speaker vacated the chair and left the hall; that immediately a Speaker *pro tem.* was elected, the oath of office administered, a call of the House ordered; sixteen out of twenty-four members were present, and answered to the call. One had been previously excused. On motion, the remaining absentees, seven in number, including the Speaker, were excused. A committee was appointed to wait on the Attorney General and obtain his opinion "concerning the expiration of the legislative assembly," which, under section 250, paragraph 6, R. S. of Idaho (Appendix A) he was required to give. On report of the committee, with the opinion of the Attorney General that the hour of adjournment could not be inquired into, a number of bills were passed and signed; sev-

eral communications were received from the Council and Governor; notice of approval of bills by the Governor; a message from him, an adjournment *sine die;* the signing of the journal by the Speaker *pro tem.*, and attestation thereof by the Clerk.

It is perfectly clear all this is not the action of the Clerk, but of a two-thirds majority of the House, claiming to act advisedly and regularly as the House of Representatives. It is not the Clerk that made the Journal; he only recorded therein what a majority of the lawful members of the House, claiming to be the House of Representatives, did. He did not falsely enter therein the communications from and to the Council, nor from and to the Governor. It was not false, but true, that the House thus organized claimed to act as the true and lawful House of Representatives.

The petition in this case was not presented on account of any contumacy of the Clerk, but of the contumacy of the legislature itself, in declining to recognize or assent to the arbitrary unauthorized action of the Speaker, when he tried to dissolve the session without its approval.

The admission of the Clerk, by demurrer or otherwise, cannot and should not be obligatory on the House. If the Clerk should happen to be in sympathy with a dissatisfied member of the legislative body, and in court, or out of court, should confess the whole case alleged by any such member, or as the plaintiffs' claim, of any dissatisfied citizen of the territory, a court would not be justified, in the exercise of its discretion, to accept such an admission of a subordinate agent as a sufficient basis

to warrant the issue of a writ of mandamus to add to or subtract from the records of the House. If a clerk of a court should fail to enter some material action of the court, and the party prejudiced thereby should apply to a superior court for a mandamus against the Clerk to compel the making of the entry, it would be refused. The mandamus would be directed to the subordinate court, and that court could give the proper command to its own agent. If the clerk had made a false entry, the same course of proceedings would apply. It would not avail to say, because the action was had and not entered, the record was not a record but a nullity, or because an action is recorded therein which did not occur, it is not a record but a nullity. Every entry in the record of anybody regularly made by the proper recording officer of that body is, *prima facie*, the action of the body, whether it be a court or a legislature. If the record needed to be changed because it is not true, process is, or should be, directed to the principal, and not to the subordinate agent. The subordinate cannot be held to obey two masters. The court might direct him to do one thing; the legislature in session might direct him to do the reverse. Which should he obey?

If the court has power and inclination now to give this command, it will have the power whether the legislature is in session or not. If the principle be adopted that it can give a command to the subordinate agents of the legislature of Idaho to correct the Journal, it has the power to give a like command to the clerk of the Senate or the House of Representatives of the United States. When a su-

perior court will not give a command to the agent of a subordinate court, it would scarcely comport with safety or propriety to take such action against the clerk of a supreme legislature assembly of a territory or a nation.

G. A. JENKS,
Of Counsel for Appellees.

Sec. 10. Holidays within the meaning of these Revised Statutes are: Every Sunday, the first day of January, the twenty-second day of February, the fourth of July, the twenty-fifth day of December, every day on which an election is held throughout the territory, and every day appointed by the President of the United States, or by the Governor of this Territory for a public fast, thanksgiving, or holiday.

Sec. 116. The term of office of members of the legislature is two years from the first day of December, next after their election.

Sec. 117. The members of the legislature must be elected at the general election in the year eighteen hundred and eighty-eight, and at the general election every two years thereafter.

Sec. 120. The legislature must assemble at the seat of government on the second Monday in December, eighteen hundred and eighty-eight, and on the second Monday in December every two years thereafter.

Sec. 123. The President and the President *pro tem.* of the Council, and the Speaker and the Speaker *pro tem.* of the House, may administer the oath of office to any member, and to the officers of their respective bodies. The members of any committee may administer oaths to witnesses in any matter under examination.

Sec. 124. The clerks, at the close of each session of the legislature, must mark, label, and arrange all bills and papers belonging to the archives of their respective Houses, and deliver them, together with all the books of both Houses, to the Secretary of the Territory, who must certify to the reception of the same.

Sec. 250. It is the duty of the Attorney General:

* * * * * * * *

6. To give his opinion in writing, without fee, to the legislature or either House thereof, and to the Governor, the Territorial Secretary, Controller, Treasurer, the Trustees or Commissioners of Territorial Institutions, when required, upon any question of law relating to their respective offices.

* * * * * * * *

CHAPTER II.

Of the Supreme Court.

SECTION 3815. The jurisdiction of this court is of two kinds:

1. Original; and
2. Appellate.

Sec. 3816. Its original jurisdiction extends to the issuance of writs of mandate, review, prohibition, habeas corpus, and all writs necessary to the exercise of its appellate jurisdiction.

Sec. 4169. The plaintiff may unite several causes of action in the same complaint, where they all arise out of:

1. Contracts, express or implied;
2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same;
3. Claims to recover specific personal property, with or without damages for the withholding thereof;
4. Claims against a trustee by virtue of a contract, or by operation of law;
5. Injuries to character;
6. Injuries to person;
7. Injuries to property.

The causes of action so united must all belong to one only of these classes, and must affect all the parties to the action and not require different places of

trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to the character or to the person.

CHAPTER II.

Writ of Mandate.

SECTION 4976. The writ of mandamus may be denominated a writ of mandate.

Sec. 4977. It may be issued by any court, except a justice's or probate court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board or person.

Sec. 4978. The writ must be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. *It must be issued upon affidavit on the application of the party beneficially interested.*

Sec. 5950. Courts take judicial notice of the following facts:

* * * * * * * *

3. Public and private official acts of the legislative, executive and judicial departments of this Territory and of the United States.

* * * * * * *

5. The accession to office and the official signatures and seals of office of the principal officers of government in the legislative, executive and judicial departments of this Territory, and of the United States.

APPENDIX B.

THURSDAY—ELEVENTH DAY.

HOUSE OF REPRESENTATIVES,
BOISE CITY, IDAHO, *Dec.* 20, 1888.

House met pursuant to adjournment.

Mr. Speaker in the chair.

* * * * * * * *

At 4 o'clock, on motion of Mr. Bruner, the House adjourned until 2 o'clock P. M., Jan. 2 1889.

H. Z. BURKHART,
Speaker.

Attest:
CHAS. H. REED,
Chief Clerk.

TWENTY-FOURTH DAY.

HOUSE OF REPRESENTATIVES,
BOISE CITY, *Jan.* 2, 1889.

House met pursuaut io adjournment.

Mr. Speaker in the Chair.

* * * * * * * *

Pending the reading of the journal, the Speaker vacated the chair and left the Hall of the House, and Mr. Badley then nominated Mr. Geo. P. Wheeler for Speaker of the House pro tem. for transaction of futher business.

Mr. Wheeler was elected by acclamation.

Mr. Wheeler thereupon took the chair.

On motion of Mr. Badley a committee of two were appointed to select a person authorized to administer the oath to the Speaker pro tem.

Messrs. Badley and De Haven appointed as such committee.

Mr. E. A. Wilson, Notary Public, then administered the oath to the Speaker pro tem.

Mr. Badley moved a call of the House.

Motion prevailed.

ROLL CALLED.

Present: Badley, Clay, Crow, Chaney, Day, De Haven, Gorton, Jordan, Lyons, Kilborn, Martin, Mitcham, Sampson, Sanburn, Van Schaick and Mr. Speaker.

Absent: Bruner, Emery, Kurtz, Mintzer, Sargent, Waring and Burkhart.

Excused: Mr. Davis.

Mr. Mitcham moved to excuse absentees.

Badley moved that further call of the House be dispended with.

Motion prevailed.

Mr. Badley moved that a committee of one be appointed to wait upon the Attorney-General and obtain his opinion concerning the expiration of the Legislative Assembly.

Motion prevailed.

The Speaker appointed Mr. Jordan as such committee.

Mr. Jordan presented the following communication:

Feb. 7, 1889.

Hon. Geo. P. Wheeler, Speaker of the House of Representatives.

Sir: The session of the Legislature does not expire until the end of the sixtieth legislative day. When the House adjourns at the end of the present legislative day the present session will end. No court or other branch of the Government can or will inquire as to the hour of your adjournment.

Very respectfully,

RICHARD Z. JOHNSON.

On motion of Mr. Badley the communication was ordered placed on the journal.

The Speaker announced that he was about to sign the following:

House Bill No. 88.

House Joint Memorial No. 3.

House Bill No. 62.

Mr. De Haven moved to suspend the rules and take up substitute for House Bill No. 57.

Motion prevailed.

Substitute for House Bill No. 57, returned by Council with amendments.

Mr. De Haven moved that House do not concur in Council amendments.

Motion prevailed.

Mr. Martin moved to indefinitely postpone the substitute.

Motion prevailed.

House Bill No. 102, Badley.

Mr. Badley moved to indefinitely postpone H. Bill No. 102.

Motion prevailed.

Mr. Badley moved that the Chief Clerk be requested to notify the Council of the action of the House in electing a Speaker pro tem.

Motion prevailed.

The Speaker announced that he was about to sign Council Bill No. 42 and Council Bill No. 37.

Mr. Badley moved that the Governor and Attorney-General be informed as to the action of the Council on Messages from the House.

Motion prevailed.

Mr. Martin, from the Committee on Engrossed Bills, presented the following report:

Mr. Speaker: Your Committee on Engrossed Bills, to whom was referred House Bills No. 98 and 82, also substitute for House Bill No. 17, beg leave to report that the same are engrossed, but have not had time to examine them.

MARTIN, *Chairman.*

MESSAGE FROM THE COUNCIL.

OFFICE OF CHIEF CLERK OF THE COUNCIL,
BOISE CITY, IDAHO, *Feb.* 7, 1889.

Mr. Speaker: I am instruced to inform your Honroable Body that his Excellency has this day approved C. B. No. 29, "relating to the Board of

County Commissioners," also Council Joint Resolution No. 6, "providing for the printing of the report of the Territorial Superintendent of Public Instruction."

Respectfully,
EDWARD L. CURTIS,
Chief Clerk.

OFFICE OF CHIEF CLERK OF THE COUNCIL,
BOISE CITY, IDAHO, *Feb.* 7, 1889.

Mr. Speaker: I am instructed to inform your Honorable Body that the Council has elected Hon. S. F. Taylor President pro tem. of the Council and have proceeded to business by calling the roll and a quorum being present.

Respectfully,
EDWARD L. CURTIS,
Chief Clerk.

Mr. Badley moved that Clerk be instructed to inform the Council of the action of the House in selecting a Speaker pro tem.

Motion prevailed.

Mr. De Haven, from the Committee on Enrolled Bills, presented the following report:

Mr. Speaker: Your Committee on Enrolled Bills have examined and found correctly enrolled H. B. No. 6, to provide postage stamps for transmitting laws; substitute for H. B. 63, to allow the purchase of toll roads and bridges and construction of the same; H. B. No. 62, relating to tax deeds; H. B. No. 88, to provide for publication of the reports of Supreme Court, and H. J. M. No. 3, relating to National Park; and the same were presented to the Governor on Feb. 7, 1889.

DE HAVEN, *Chairman.*

House Bill No. 103, by Martin, to amend Section 2126, Revised Statutes.

De Haven moved that the bill be indefinitely postponed.

Motion prevailed.

House Bill 104.

Mr. Badley moved that the bill be indefinitely postponed.

Motion prevailed.

Mr. Badley moved to return to third reading of bills.

Motion prevailed.

House Bill No. 84, by Sanburn, relating to approaches to watering places.

Read third time.

Question being, "Shall the Bill pass?"

The ayes and nays were taken with the following result:

ROLL CALL.

Ayes—Badley, Clay, Crow, Chaney, Day, De Haven, Gorton, Lyons, Kilborn, Martin, Mitcham, Sanburn, Van Schaick and Mr. Speaker—14.

Nays—Jordan—1.

Absent—Bruner, Davis, Emery, Kurtz, Mintzer, Sampson, Sargent and Waring.

On motion of Mr. Chaney, rules were suspended and Council Bill No. 51, read third time.

Mr. Kilborn moved a call of the House.

Motion prevailed.

ROLL CALLED.

Present: Badley, Clay, Crow, Chaney, Day, De Haven, Gorton, Jordan, Lyons, Kilborn, Martin, Mitcham, Sampson, Sanburn, Van Schaick and Mr. Speaker.

Excused: Bruner, Davis, Emery, Kurtz, Mintzer, Sargent, Waring and Burkhart.

MESSAGE FROM THE GOVERNOR.

DEPARTMENT OF THE INTERIOR,
BOISE CITY, IDAHO, *Feb.* 7, 1889.

Mr. Speaker: I have this day approved House Bill No. 62, relating to tax deeds.

Respectfully yours,
E. A. STEVENSON
Governor.

Further call dispensed with.

Question being "Shall Council Bill No. 51 pass?"

The ayes and nays were taken with the following result:

ROLL CALL.

Ayes—Clay, Crow, Chaney, Day, De Haven, Gorton, Jordan, Kilborn, Mitcham, Sanburn, Van Schaick and Mr. Speaker—12.

Nays—Lyons, Martin and Sampson—3.

Absent—Badley, Bruner, Davis, Emery, Kurtz, Mintzer, Sargent and Waring.

On motion of Mr. Mitcham, the House took a recess for ten minutes.

House re-assembled.

Mr. Chaney asked for call of the House.

Roll called with the following result:

ROLL CALL.

Present: Badley, Crow, Chaney, De Haven, Gorton, Jordan, Kilborn, Martin, Mitcham, Sampson, Sanburn, Van Schaick and Mr. Speaker.

Absent: Day and Lyons.

Excused: Bruner, Clay, Davis, Emery, Kurtz, Mintzer, Sargent, Waring and Burkhart.

Further call dispensed with.

REPORT OF THE COMMITTEE ON AGRICULTURE.

Mr. Speaker: Your Committee on Agriculture, to whom was referred Council Bill No. 38, beg leave to report the same back and respectfully recommend that it do pass.

JORDAN, *Chairman.*

On motion of Mr. De Haven the rules were suspened, Council Bill No. 38, read third time.

Question being "Shall the Bill pass?"

The ayes and nays were taken with the following result:

ROLL CALL.

Ayes—Badley, De Haven, Jordan, Kilborn, Martin, Sanburn, and Van Schaick—8.

Nays—Clay, Crow, Chaney, Gorton, Mitcham, Sampson, and Mr. Speaker—7.

Absent—Bruner, Davis, Emery, Kurtz, Lyon, Mintzer, Sargent, Waring and Burkhart.

So the bill passed and title approved.

The Speaker announced that he was about to sign Council Bill No. 8 and Council substitute for House Bills Nos. 7 and 18 and Council Bill No. 5.

Mr. Chaney moved call of the House.

Roll called with following result:

ROLL CALL.

Present: Badley, Clay, Crow, Chaney, Day, De Haven, Gorton, Jordan, Kilborn, Martin, Mitcham, Sampson, Sanburn, Van Schaick, Waring and Mr. Speaker.

Absent: Bruner, Davis, Emery, Kurtz, Lyons, Mintzer, Sargent and Burkhart.

On motion of Mr. De Haven further call was dispensed with.

MESSAGE FROM COUNCIL.

OFFICE OF CHIEF CLERK OF THE COUNCIL,
BOISE CITY, IDAHO, *Feb.* 7, 1889.

Mr. Speaker: I am instructed to inform your Honorable Body that the Council has under consideration and passed with an amendment substitute for House Bills 46, 48, 81 and 83, "An act creating and organizing the Counties of Elmore and Logan and defining the boundaries of Bingham and Alturas," and asks the concurrence of your Honorable Body in said amendment.

Also had under consideration and passed House Bill No. 89, "An act to amend Section 1298 E (Sec. 6), of the Revised Statutes of Idaho territory."

Both of which are herewith transmitted.

Respectfully,
EDWARD L. CURTIS,
Chief Clerk.

OFFICE OF CHIEF CLERK OF THE COUNCIL,
BOISE CITY, IDAHO, *Feb.* 7, 1889,

Mr. Speaker: I am instructed to inform your Honorable Body that his Excellency, the Governor, has this day approved the following Council Bills, viz.:

Council Bill No. 37, an act to invest the money in the Territorial General School Fund of Idaho Territory.

Also C. B. No. 42, "An act to prevent the sale of cigarettes to minors and for other purposes."

Respectfully,
EDWARD L. CURTIS,
Chief Clerk.

Substitute for House Bills Nos. 46, 48, 81 and 83, returned by the Council with amendments.

On motion of Mr. De Haven the Council amendments were agreed to.

On motion of Mr. Gorton the House took a recess for fifteen minutes.

House re-assembled,

Mr. Mitcham moved a call of the House.

Motion prevailed, and roll called with the following result:

ROLL CALL.

Present: Badley, Clay, Crow, Chaney, Gorton, Jordan, Lyons, Kilborn, Martin, Mitcham, Sampson, Sanburn, Van Schaick and Mr. Speaker.

Absent: Day and De Haven.

Excused: Bruner, Burkhart, Davis, Emery, Kurtz, Mintzer, Sargent and Waring.

Mr. Mitcham moved that further call be dispensed with.

Motion prevailed.

Mr. Badley, by leave, introduced House Bill No. 105, an act amendatory of and supplementary to an act entitled an act to re-apportion the members of the Legislature.

On motion of Mr. Badley the rules were suspended, the bill considered engrossed, read third time, and placed on its final passage.

Question being, "Shall the Bill pass?"

The ayes and nays were taken with the following result:

ROLL CALL.

Ayes—Badley, Clay, Crow, Chaney, Day, Gorton, Jordan, Kilborn. Martin, Mitcham, Sampson, Sanburn, Van Schaick and Mr. Speaker—14.

Nays—None.

Absent—Burner, De Haven, Davis, Emery, Kurtz, Lyons, Mintzer, Sargent, Waring and Burkhart.

So the bill passed and title approved.

Mr. Mitcham moved a call of the House.

Motion prevailed.

ROLL CALLED.

Present: Badley, Clay, Crow, Chaney, Day, Gorton, Jordan, Lyons, Kilborn, Martin, Mitcham, Sanburn, Van Schaick and Mr. Speaker.

Absent: Burkhart, Burner, De Haven, Emery, Kurtz, Mintzer, Sampson, Sargent and Waring.

Excused: Davis.

On motion of Mr. Badley further call was dispensed with.

MESSAGES FROM THE COUNCIL.

OFFICE OF CHIEF CLERK OF THE COUNCIL,
BOISE CITY, IDAHO, *Feb.* 7, 1889.

Mr. Speaker: I am instructed to inform your Honorable Body that the Council has had under consideration and passed Council Bill No. 55, "An act for the relief of John Early, A. C. Girard and E. Pinkham, which is herewith transmitted and your favorable consideration requested.

Respectfully,

EDWARD L. CURTIS,
Chief Clerk.

OFFICE OF CHIEF CLERK OF THE COUNCIL,
BOISE CITY, IDAHO, *Feb.* 7, 1889.

Mr. Speaker: I am instructed to inform your Honorable Body that his Excellency has this day approved C. B. No. 8, "An act to authorize the State of Oregon to erect, maintain and operate a hatchery in the Territory of Idaho."

Respectfully,

EDWARD L. CURTIS,
Chief Clerk.

Mr. Crow moved a call of the House.

Motion prevailed.

Roll called with the following result:

ROLL CALL.

Present: Clay, Crow, Chaney, Day, Gorton, Jordan, Lyons, Kilborn, Martin, Mitcham, Sampson, Van Schaick and Mr. Speaker.

Absent: Badley, Bruner, Burkhart, De Haven, Davis, Emery, Kurtz, Mintzer, Sargent, Waring and Wheeller.

Martin moved that further call of the House be dispensed with.

Motion prevailed.

Council Bill No. 55, for the relief of A. C. Girard and others.

Read first and second times.

On motion of Mr. Martin the rules were suspended, the bill read third time and placed on its final passage.

Question being, "Shall the Bill pass?"

The ayes and nays were taken with following result:

ROLL CALL.

Ayes—Badley, Clay, Chaney, Day, De Haven, Gorton, Jordan, Kilborn, Martin, Mitcham, Sampson, Sanburn, Van Schaick and Mr. Speaker—14.

Nays—Crow—1.

Absent—Bruner, Davis, Emery, Kurtz, Lyons, Mintzer, Sargent, Waring and Burkhart.

So the bill passed and title approved.

The Speaker announced that he was about to sign substitute for House Bills Nos. 46, 48, 81 and 83.

MESSAGE FROM THE GOVERNOR.

DEPARTMENT OF THE INTERIOR,
BOISE CITY, IDAHO, *Feb.* 7, 1889.

Mr. Speaker: I have the honor to announce to your Honorable Body that I have this day approved substitute for House Bills Nos. 46, 48, 81 and 83, relating to the division of Alturas County.

Respectfully yours,

E. A. STEPHENSON,
Governor.

REPORT OF THE COMMITTEE ON ENROLLED BILLS.

Mr. Speaker: Your Committee on Enrolled Bills have examined and found correctly enrolled H. B. No. 70, relating to the trespassing of hogs, and H. B. No. 89, relating to the practice of medicine and the same were presented to the Governor on Feb. 7, 1889.

DE HAVEN,
Chairman.

Mr. Chaney presented the following resolution:

WHEREAS, a small manority of the members of this House have tried by every means in their power to block all other legislation for the sole and avowed purpose of, by artifices, defeating one certain measure introduced in the House, viz: the Alturas division measure, and

WHEREAS, the Speaker and all other of the minority members did desert this House, with the avowed purpose of thereby defeating all measures before this House for consideration; therefore be it

Resolved, That this House does unanimously censure the said Ex-Speaker and his minor following for their action in so withdrawing from the deliberations of this Body.

Resolved, That we do hereby express our entire confidence in our Speaker, *pro tem*, the Honorable George P. Wheeler, and that we herewith return our expression of thanks and hearty appreciation to the said Hon. George P. Wheeler, for so ably filling the position but lately ignominiously vacated.

CHANEY.

Adopted, ordered placed upon the minutes.

MESSAGE FROM THE GOVERNOR.

DEPARTMENT OF THE INTERIOR.
BOISE CITY, IDAHO, *Feb.* 7, 1889.

Mr. Speaker: I have this day approved H. B. No. 70, relating to the trespassing of hogs.

Also, House Bill No. 89.

Amending Section 1298 (E), (Sec. 6) of the R. S. of Idaho.

Respectfully yours,
E. A. STEVENSON,
Governor.

On motion of Mr. Badley, the House took an informal recess for fifteen minutes.

House re-assembled.

MESSAGES FROM THE COUNCIL.

OFFICE OF CHIEF CLERK OF THE COUNCIL.
BOISE CITY, IDAHO, *Feb.* 7, 1889

Mr. Speaker: I am instructed to inform your Honorable Body that his Excellency has this day approved Council substitute for H. B. No. 7, H. B. No. 18 and C. B. No. 5, relating to violations of game and fish laws.

Also, C. B. No. 38, "An act relating to suppression of contagious diseases among live stock."

Respectfully,
EDWARD L. CURTIS,
Chief Clerk.

OFFICE OF CHIEF CLERK OF THE COUNCIL,
BOISE CITY, IDAHO, *Feb.* 7, 1889.

Mr. Speaker: I am instructed to inform your Honorable Body that the Council has had under con-

sideration and passed House Bill No. 105, "An act amendatory of, and supplemental to an act entitled: An act to apportion the members of the Legislative Assembly of the Territory of Idaho, approved Feb. 6, 1889."

Which is herewith transmitted.

Respectfully,

EDWARD L. CURTIS,
Chief Clerk.

Council Joint Resolution No. 9.

Read first and second times.

Mr. Bradley moved that rules be suspended and bill placed on its final passage.

Motion prevailed.

Read third time.

Question being, "Shall the Bill pass?"

The ayes and nays were taken with the following result:

ROLL CALL.

Ayes—Bradley, Clay, Crow, Chaney, Day, De Haven, Jordan, Kilborn, Martin, Mitcham, Sampson, Sanburn, Van Schaick and Mr. Speaker—14.

Nays—none.

Absent—Bruner, Burkhart, Davis, Emery, Gorton, Kurtz, Lyons, Mintzer, Sargent and Waring.

So the resolution passed.

MESSAGE FROM THE COUNCIL.

OFFICE OF CHIEF CLERK OF THE COUNCIL,
BOISE CITY, IDAHO, *Feb.* 7, 1889.

Mr. Speaker: I am instructed to inform your Honorable Body that the President *pro tem.* has appointed Mr. Nelson a committee of one to act with a like committee on the part of the House, to wait upon his Excellency, the Governor, and ascertain whether he had any further communication to make to the Legislative Assembly.

Respectfully,

EDWARD L. CURTIS,
Chief Clerk.

ROLL CALL.

Present: Clay, Crow, Chaney, Day, Gorton, Jordan, Kilborn, Mitcham, Sampson, Sanburn, Van Schaick, and Mr. Speaker.

Absent: Badley, Bruner, De Haven, Davis, Emery, Kurtz, Lyons, Martin, Mintzer, Sargent, Waring, and Burkhart.

Further call dispensed with.

MESSAGE FROM THE COUNCIL.

OFFICE OF CHIEF CLERK OF THE COUNCIL,
BOISE CITY, IDAHO, *Feb.* 7, 1889.

Mr. Speaker: I am instructed to inform your Honorable Body that his Excellency, the Governor, has this day approved C. B. No. 51 and C. B. No. 55, also C. J. Resolution No. 9.

Respectfully, EDWARD L. CURTIS,
Chief Clerk.

MESSAGE FROM THE GOVERNOR.

DEPARTMENT OF THE INTERIOR,
BOISE CITY, IDAHO, *Feb.* 7, 1889.

Gentlemen of the Legistive Assembly: I have the honor to inform your Honorable Bodies that I have no further official communications to make.

Permit me to thank you for the uniform courtesy extended this department and allow me to assure you that nothing will ever mar the recollections, pleasant as they are, of the session now so nearly ended, and may each of you, on your return to your constituents, receive from them a well-merited appreciation of the inestimable services rendered them and the Territory.

I am, very respectfully yours,
E. A. STEVENSON,
Governor.

On motion of Mr. Chaney the Fifteenth Session of the Legislative Assembly of Idaho Territory adjourned *sine die*. GEORGE R. WHEELER,
Speaker, pro tem.

Attest:
CHAS. H. REED,
Chief Clerk.

For safe Bookseller Fitzgerald vs Green
134-377
134-372

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. [redacted]. 1118

W. L. THOMAS, POLICE SERGEANT OF THE CITY OF RICHMOND, APPELLANT,

vs.

WILSON LONEY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA.

FILED MARCH 26, 1889.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1531.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, MARCH 28, 1889.

1 In the Circuit Court of the United States for the Eastern District of Virginia.

Ex Parte: WILSON LONEY on Petition for Writ of *Habeas Corpus.*

Be it remembered that heretofore, to wit, on the 16th day of February, A. D. 1889, came the petitioner, Wilson Loney, and presented to the circuit court of the United States for the eastern district of Virginia his petition for the writ of *habeas corpus;* which petition, together with the affidavit thereto and the order of the court thereon, is as follows, to wit:

Petition.

To the hon. the judges of the circuit court of the United States, eastern district of Virginia, sitting at Richmond, Va.:

The petition of Wilson Loney respectfully represents that on the 2d day — Feb., 1889, a warrant was sworn out against him upon the complaint of one George D. Wise, before Ambrose Barratt, justice of the peace for said city, charging your petitioner with perjury alleged to have been committed by him in making oath to a certain deposition taken by and before A. J. Gary, a notary public for the city of Richmond, in the State of Virginia, upon the examination of your petitioner as a witness in a contested election case
2 for a seat in the Fifty-first Congress of the United States of America from the third congressional district of Virginia, in which cause Edmund Waddill, Jr., is contestant and George D. Wise is contestee. Your petitioner further represents that the offence alleged against him is punishable under section 5392 of the Revised Statutes of the United States, and is therefore within the exclusive cognizance of the courts of the United States, it not being otherwise provided by law.

Your petitioner is now in the custody of William L. Thomas, who is in charge of the third police station of the city of Richmond, under the said warrant of arrest, a copy of which is herewith filed, marked Exhibit A, and made a part of this petition, under which arrest and detention your petitioner claims he is restrained of his liberty in violation of the Constitution and laws of the United States.

Your petitioner therefore humbly prays that this honorable court will award him a writ of *habeas corpus*, directed to said William L. Thomas, police sergeant, in charge of third police station of the city of Richmond, commanding him to produce the body of your petitioner before this honorable court, together with the cause of his detention, and that your petitioner may be discharged from his said unlawful custody, and that the matter be enquired into by your honor's court.

3 (Signed) WILSON LONEY,
By counsel, EDGAR ALLAN, *P. Q.*

Affidavit to Above Petition.

CITY OF RICHMOND, *To wit:*

This day Wilson Loney personally appeared before me, James M. Donnan, a notary public for city of Richmond, and made oath that the allegations of the foregoing petition are true.

Given under my hand this 16th day of February, 1889.

JAMES M. DONNAN,
Notary Public of City of Richmond, Virginia.

Order on Foregoing Petition.

Let the writ herein prayed for be issued and made returnable before the U. S. circuit court, at Richmond, on the 18th day of February, 1889, at 11 o'clock a. m., in the United States court-house, in Richmond.

Richmond, 16th Feb., 1889.

RO. W. HUGHES, *Judge.*

And on the same day, to wit, on the 16th day of February, 1889, in obedience to the foregoing order, the writ of *habeas corpus* issued from the clerk's office of said circuit court. Said writ, to-
4 gether with the marshal's return thereon, is as follows, viz:

Writ of Habeas Corpus.

UNITED STATES CIRCUIT COURT, *Eastern District of Virginia,* } *ss:*

The President of the United States of America to Wm. L. Thomas, sergeant of police, Richmond, Virginia, his deputies, agents, or whoever may have the prisoner in custody, Greeting:

We command you that the body of Wilson Loney, detained by you and under your custody, as it is said, by whatsoever name he may be called, together with the day and cause of his being taken and detained, you have before the Honorable Ro. W. Hughes, one of the judges of our circuit court of the United States for the eastern district of Virginia, sitting at the United States court-room, in the city of Richmond, Virginia, on the 18th day of February, 1889, at 11 o'clock a. m., to do, submit to, and receive all and singular those things which shall then and there be considered of him in this behalf.

And have you then and there this writ.

Witness the Hon. M. W. Fuller, Chief Justice of the Supreme Court of the United States, at Richmond,
5 Seal of U. S. Cir. C't, Ea. Dist. Va. this 16th day of February, A. D. 1889.

M. F. PLEASANTS, *Clerk.*

The above writ is endorsed as follows:

I hereby depute C. L. Eubank to execute this writ.

T. W. SCOTT,
U. S. Marshal.

Marshal's Return.

Executed Feb'y 18, '89, on Jno. J. Crutchfield, police justice; also on Wm. L. Thomas, sergeant of the police.

CHARLES L. EUBANK,
Spec. Deputy U. S. Marshal.

And on another day, to wit, on the 18th day of February, 1889, came Wm. L. Thomas, police sergeant of the city of Richmond, and filed in the clerk's office of said circuit court his return to the foregoing writ; which return, together with the exhibit filed therewith, is as follows, to wit:

In the United States Circuit Court, Eastern District of Virginia.

6 In the Matter of WILSON LONEY on Petition for *Habeas Corpus.*

In obedience to the mandate of the U. S. court, dated February 16th, 1889, commanding me to produce before said court the body of Wilson Loney, at 11 a. m., on Feb. —, 1889, together with the cause of his detention, I hereby, at said time and place, deliver the said Wilson Loney to the custody of C. L. Eubank, dep. U. S. marshal, and file the within copy of the Commonwealth's warrant of arrest as the authority by which he was held in my custody; and, having fully answered, pray, &c.

W. L. THOMAS,
Police Serg't, City of Richmond, in Charge 3rd Police Station.

Subscribed and sworn to before me this 18th day of February, 1889.

M. F. PLEASANTS, *Clerk.*

The warrant filed with above return is as follows, viz:

Copy.

CITY OF RICHMOND, *To wit:*

To all or any one of the police officers of the city of Richmond:

7 Whereas Geo. D. Wise has this day made complaint and information on oath before me, the undersigned, a justice of the peace of said city, that on the 2d day of February, 1889, at said city, Wilson Loney did unlawfully commit wilful perjury in the city of Richmond, before A. J. Gary, a notary public of said city, he having been sworn to speak the truth in the matter of contest between Honl. G. D. Wise and Edmond Waddell:

These are, therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and bring before me, or some other justice of the peace of said city, the body of the said Wilson Loney to answer said complaint and to be further dealt with according to law.

And, moreover, upon the arrest of the said Wilson Loney by virtue of this warrant I command you, in the name of the Commonwealth of Virginia, to summon A. J. Gary, Honl. Geo. D. Wise,

Washington Canto to appear at the police justice's court as witness-, to testify in behalf of the Commonwealth against the said Wilson Loney, on the 6th day of Feb'y—that is to say, on the next day following the day of arrest—and have then and there this warrant with your return thereon.

Given under my hand and seal this 5 day of Feb'y, 1889.

(Signed) AMBROSE BARRATT, *J. P.* [SEAL.]

The foregoing exhibit bears the following endorsements, viz:

8 THE COMMONWEALTH *vs.* WILSON LONEY. } Warrant. (Copy.)

Executed by arresting the within-named Wilson Loney and by summoning the within-named witnesses.

By E. P. HULCE &
WASHINGTON & FORE.

This is a true copy of the warrant against Wilson Loney filed in the police court of the city of Richmond.

Teste: E. B. WHITE, *Clerk.*

And on the same day, to wit, on the 18th day of February, 1889, came the petitioner, by counsel, and presented to the court his further petition in this behalf; which petition, together with the order of court made and entered thereon as of the said 18th February, 1889, is as follows, to wit:

In the United States Circuit Court, Eastern District of Virginia.

On the Petition of WILSON LONEY. *Habeas Corpus.*

The above petitioner, who is now in custody of the U. S. marshal in pursuance of the writ issued in this cause, respectfully represents that at the time of his alleged unlawful arrest he was in
9 the law office of Edgar Allan, in the city of Richmond, pursuant to a summons to testify as a witness in the congressional contested election contest for a seat in the 51st Congress of the U. S. from the 3rd cong'l dist. of Virginia; that he had nearly completed his deposition or testimony in said cause when he was arrested by a police officer of the city of Richmond, as alleged in his original petition, and before his said testimony was completed and his deposition signed. Your petitioner prays that he may be permitted, on such terms as the court may direct, to complete and sign his said deposition before further proceedings in this cause; and he will ever pray, &c.

WILSON LONEY,
By counsel, EDGAR ALLEN, *P. Q.*

Sworn to before me by said Wilson Loney this 18th day of February, 1889.

M. F. PLEASANTS, *Clerk.*

Order of Court on Above Petition

In re WILSON LONEY. Order, February 18th, 1889.

On the filing and hearing of the within petition it is ordered that the marshal of the court do take the said Wilson Loney
10 to the office of Edgar Allan, in the city of Richmond, and there release him until he shall have completed the deposition referred to in his petition, and upon the completion of the same the said marshal will resume custody of the said Wilson Loney and bring him before this court for such proceedings as may be had upon his petition for writ of *habeas corpus*.

RO. W. HUGHES, *Judge*.

And now, at this day, to wit, at a circuit court of the United States for the eastern district of Virginia, held at Richmond, in said district, on the 19th day of February, 1889, the following order was entered.

In the Circuit Court of the United States for the Eastern District of Virginia.

Ex Parte, WILSON LONEY.

W. L. Thomas, police sergeant of the city of Richmond, in charge of the third police station, in obedience to the writ of *habeas corpus* awarded the petitioner and to him directed, this day produced the body of the petitioner, Wilson Loney, in open court and made the following return upon the writ, viz: "In obedience to the mandate of the U. S. court, dated Feb. 16th, 1889, com-
11 manding me to produce before said court the body of Wilson Loney, at 11 a. m., on Feb. 18th, 1889, together with the cause of his detention, I hereby, at said time and place, deliver the said Wilson Loney to the custody of C. L. Eubank, dept. U. S. marshal, and file the within copy of the Commonwealth's warrant of arrest as the authority by which he was held in my custody:"

Copy of Warrant.

CITY OF RICHMOND, *To wit:*

To all or any one of the police officers of the city of Richmond:

Whereas Geo. D. Wise has this day made complaint and information on oath before me, the undersigned, a justice of the peace of said city, that on the 2nd day of February, 1889, at said city, Wilson Loney did unlawfully commit wilful perjury in the city of Richmond before A. J. Gary, a notary public of said city, he having been sworn to speak the truth in the matter of contest between Honl. G. D. Wise and Edmond Waddell: These are therefore, in the name of the Commonwealth of Virginia, to command you forthwith to apprehend and bring before me, or some other justice of the peace of said city, the body of the said Wilson Loney to answer said complaint, and to be further dealt with according to law; and, moreover, upon the arrest of the said Wilson Loney by virtue of this

warrant I command you, in the name of the Commonwealth
12 of Virginia, to summon A. J. Gary, Honl. Geo. D. Wise, Washington Canto to appear at the police justice's court as witnesses, to testify in behalf of the Commonwealth against the said Wilson Loney, on the 6th day of Feb'y—that is to say, on the next day following the day of arrest—and have then and there this warrant with your return thereon.

Given under my hand and seal this 5 day of Feb'y, 1889.

(Signed) AMBROSE BARRATT, *J. P.* [SEAL.]

And the court, having fully heard and considered the arguments of counsel, is of opinion, for reasons filed in writing, that the said Wilson Loney is detained in the custody of the said W. L. Thomas, sergeant, in violation of the laws of the United States, and doth order that he be discharged from the custody aforesaid. Whereupon the said W. L. Thomas in open court prayed an appeal to the Supreme Court of the United States from the judgment of the court discharging the said Wilson Loney from his custody; which appeal the court doth allow upon the execution of bond, payable to the United States of America, in the penalty of two hundred dollars, conditioned for the payment of all costs that may become due to the officers of the Supreme Court of the United States or be occasioned by said appeal; and the said W. L. Thomas having tendered a bond executed and conditioned according to law, with R. A. Ayers as surety, the same is approved and accepted.

13 It is therefore ordered that the said Wilson Loney be enlarged upon his own recognizance, conditioned for his appearance to answer the judgment of the Supreme Court of the United States upon said appeal; and the court doth further certify that all the facts of the case upon which the court based its opinion in discharging the said Wilson Loney are fully and completely set forth in the opinion of the court above referred to, and to that extent and to that purpose the opinion of the said court is made a part of this record.

RO. W. HUGHES, *Judge.*

The opinion of the court is as follows, viz:

United States Circuit Court, Eastern District of Virginia.

Ex Parte: WILSON LONEY on Petition for *Habeas Corpus.*

Ruling of the Court.

HUGHES, *J.:*

Wilson Loney was arrested by a State officer for trial before a State tribunal on a charge of perjury, alleged to have been committed in testifying as a witness in a contest for a seat in the House of
14 Representatives of the United States, directed and regulated by an act of Congress, before an officer deriving his power to take testimony in such contest solely from an act of Congress. See title second, chapter 8, Revised Statutes of the United States.

The contest in which Loney testified is not within the purview of

any law of Virginia and is unknown to the jurisdiction of the State courts. It is especially and exclusively a Federal proceeding. A notary public is a State officer, having power to administer any oath required by State law and no other. He has no power to administer oaths required by acts of Congress unless he is expressly authorized to do so by act of Congress, in doing which he acts as an officer of the United States and not as an officer of the State. This writ is issued by authority of section 753 of the Revised Statutes of the United States, which allows it "in any case in which the prisoner has done an act"—that is to say, has testified "in pursuance of a law of the United States."

Perjury committed before any officer in such a contest as the one described is amenable to punishment under section 5392 of the Revised Statutes of the United States, which declares that "every person who, having taken an oath before a competent tribunal, officer, or person in any case in which a law of the United States authorizes an oath to be administered, that he will testify truly, wilfully, and contrary to such oath, states any material matter which he
15 does not believe to be true is guilty of perjury, and shall be punished," &c., &c.

And the second section of the judiciary act of August 13, 1888, in a clause which has been continued in all the judiciary acts of Congress since 1789, provides that "the circuit courts (concurrently with the district courts) of the United States shall have exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except as otherwise provided by law," and there is no act of Congress "which provides otherwise" in respect of perjury when committed in circumstances wherein it is an offence against the United States. Section 711 of the United States Revised Statutes repeats and emphasizes the provision of the acts of 1789 to 1888.

In general, and indeed in the great majority of cases, perjury is an offence against the State, cognizable exclusively by the State courts; but when committed by persons designated by penal laws of Congress, in proceedings prescribed and regulated solely by acts of Congress, it is an offence against the United States, and is exclusively cognizable by the national courts. It is contrary to the policy of the law and to the principles of humanity that a person shall be amenable to trial and punishment for the same act in two different tribunals belonging to different jurisdictions.

Undoubtedly there are cases in which this policy of the law would seem to be ineffective. In an election where a member of Congress and a State officer are voted for at the same time a false
16 oath by the voter would be cognizable in both the national and State courts, and the latter would be generally left to deal with it. So when a murder is committed and the fatal shot is received in a national fort or dock-yard and death ensues out of such place in an adjoining county, the dual jurisdiction would again occur, and that court would proceed to trial and judgment which first took cognizance of the offence. These are exceptions to the rule of exclusive jurisdiction and bring into exercise the comity of

courts. I think it is to these cases that section 5328 of the United States Revised Statutes refers.

But the case at bar does not resemble those that have been referred to. The contest for a seat in the House of Representatives is a proceeding unknown alike to State legislation and the State judicature, and violations of the laws of Congress regulating it are offences against the United States and not against the State, of which the national courts of [have] exclusive jurisdiction. The leading authority in support of this proposition is the decision of Mr. Justice Bradley in the case of *Ex parte* Dock Bridges, in II Woods, 428.

The prisoner must be discharged from the custody of the State officer, and, if proper complaint be made, must be taken into custody by the marshal of this court, to be dealt with as provided for by the laws of Congress.

17 I have heard this case in circuit court, and will make the order of discharge in this court in order that, if I have erred in this ruling, the matter may at once be taken to the Supreme Court of the United States, where, being privileged, it may be reviewed without delay.

Bond on Appeal.

Circuit Court of the United States of America, Eastern District of Virginia.

Ex Parte: WILSON LONEY.

Know all men by these presents that we, W. L. Thomas and R. A. Ayers, are held and firmly bound unto the United States of America in the sum of two hundred dollars, to be paid to the United States of America; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 19th day of February, A. D. 1889.

Whereas the above-bound W. L. Thomas, police sergeant of the city of Richmond, hath prosecuted an appeal to the Supreme Court of the United States to reverse the judgment of the circuit court of the United States for the eastern district of Virginia, dis-

18 charging Wilson Loney from the custody of the said W. L. Thomas, sergeant, rendered upon the hearing of a writ of *habeas corpus:* Now, therefore, the condition of this obligation is such that if the above-bound W. L. Thomas shall prosecute his said appeal to effect and answer all damages and costs if he shall fail to make good his appeal, then this obligation shall be void; otherwise to remain in full force and virtue.

W. L. THOMAS. [SEAL.]
R. A. AYERS. [SEAL.]

This bond is approved.
RO. W. HUGHES, *Judge.*

19 UNITED STATES OF AMERICA, *To wit:*

The President of the United States to the judges of the circuit court of the United States for the eastern district of Virginia, Greeting:

Because in the record and proceedings and also in the rendition of the judgment of a plea which is in the said court, before you, between W. L. Thomas, police sergeant of the city of Richmond, Virginia, and Wilson Loney, a manifest error hath happened, to the great damage of the said W. L. Thomas, as by complaint appears, he [we], being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, in the District of Columbia, together with this writ, so that you may have the same at Washington, in the said District, on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 19th day of February, in the year of our Lord one thousand eight hundred and eighty-nine.

[Seal United States Circuit Court, Eastern District of Virginia.]

M. F. PLEASANTS,
Clerk of the Circuit Court of the United States for the Eastern District of Virginia.

20 UNITED STATES OF AMERICA, *Eastern District of Virginia,* } *ss:*

Ex Parte: WILSON LONEY on Petition for Writ of *Habeas Corpus.*

I, M. F. Pleasants, clerk of the circuit court of the United States for the eastern district of Virginia, hereby certify that the foregoing is a true transcript of the record and proceeding in the above-entitled cause, as the same remains on file in my office.

Seal United States Circuit Court, Eastern District of Virginia.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Richmond, in said district, this 12th day of March, A. D. 1889.

M. F. PLEASANTS,
Clerk U. S. Circuit Court, Eastern District of Virginia.

Endorsed on cover: E. Virginia C. C. U. S. No. 1531. W. L. Thomas, police sergeant of the city of Richmond, appellant, *vs.* Wilson Loney. Filed March 26, 1889.

IN THE
Supreme Court of the United States.

WM. L. THOMAS, Police Sergeant city of Richmond,
vs.
WILSON LONEY. } No. 1531.

The appellant moves the court to advance this cause, and hear it out of its order upon the docket, for the following reasons:

The appellee was arrested for a violation of the criminal laws of the State of Virginia, in swearing falsely in his examination before a notary public of the said State, engaged in taking testimony in the contested election case between Edmund Waddill, contestant, and George D. Wise, contestee, for a seat in the LIst Congress. The statutes of Virginia make such perjury an offence punishable by fine and imprisonment, and the arrest was made pursuant thereto.

Nevertheless, upon the application of the appellee, a writ of *habeas corpus* was granted by the circuit court of the United States for the Eastern District of Virginia, and upon the hearing, the appellee was discharged.

The circuit court held that the offence was exclusively cognizable in the Federal court, and that the State courts have no jurisdiction.

In view of the conflict between the subordinate State and Federal courts, and the importance of the question involved, it is believed that a speedy adjudication should be had.

The State of Virginia, therefore, by her representative, respectfully prays that the cause may be advanced, and set for hearing at an early day.

R. A. AYERS,
Attorney-General of Virginia, for Appellant.